

1 STATE OF INDIANA)
) SS:
 2 COUNTY OF DELAWARE)
 3
 IN THE DELAWARE COUNTY SUPERIOR COURT
 4
 5 CRAIG DUNN and PHILIP WILEY,)
 et al.,)
 6 Plaintiffs,)
)
 7 -v-) CAUSE NO.
) 18D01-9305-CT-06
 8 RJR NABISCO HOLDINGS)
 CORPORATIONS, et al.,)
 9 Defendants.)

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 11 VOLUME 5
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1 MR. CASSELL: All rise.
2 (Outside presence of jury)
3 THE COURT: Thank you. Be seated.
4 Good morning, Counsel.

5 ALL: Good morning.
6 THE COURT: Plaintiffs appear in
7 person by Counsel. All the Defendants
8 represented today?
9 MR. OHLEMEYER: Yes, Your Honor.
10 THE COURT: The jury is not
11 present. The Court understands there is a
12 matter we need to discuss, Mr. Motley?
13 MR. SHOCKLEY: I brought that to
14 the Court's attention, Your Honor.
15 THE COURT: Thank you, Mr.
16 Shockley.
17 MR. SHOCKLEY: Your Honor, late
18 yesterday evening, about 8:00 or 8:30 p.m.,
19 I'm not certain the precise time, an
20 attorney named Bruce Sheffler, who is a
21 partner and attorney of record in this case,
22 Dean Jarmel. They are both in the New York
23 law firm of Chadbourne & Parke, and I think
24 Mr. Falcone (phonetic) and maybe Mr. Mirror
25 (phonetic) of that firm are also attorneys
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1 of record, and the Court may recall Mr.
2 Jarmel has appeared from time to time and
3 argued some motions in front of the Court.
4 Mr. Sheffler was served with a
5 subpoena, and if I may approach the Bench, I
6 would like to present that to the Court for
7 your review.
8 THE COURT: Sure.
9 MR. SHOCKLEY: Mr. Sheffler was
10 served, it's my understanding, in the dining
11 room last night at the hotel or close
12 thereby by one of the attorneys in this case
13 after they -- the plaintiff's attorneys,
14 that is -- had made some contact with him,
15 talked with him, knew that he was present
16 and so forth.
17 The subpoena attachment that you have
18 there, Your Honor, calls for a number of
19 things which are improper. They are
20 attorney-client privileged materials. As I
21 pointed out, Mr. Sheffler and his firm are
22 attorneys of record, Mr. Sheffler himself is
23 not, but his firm are attorneys of record in
24 this case. They represent some of the same
25 clients that I do and that Mr. Ohlemeyer
1353
1 does. Some of those documents that are
2 requested are clearly irrelevant, such as
3 subpoenas that were issued. They just asked
4 for the subpoenas that were issued, if any,
5 from Federal Grand Juries from the state of
6 Minnesota litigation.
7 This is also late discovery, Your
8 Honor, if that's the purpose of it.
9 Mr. Sheffler is not a witness in this case.
10 This isn't like something he may have that
11 may relate to his testimony. It seems to me
12 that what they're trying to do here is evade
13 or circumvent the Court's discovery cutoff
14 which was last November, as I recall, was
15 extended once or twice at their request.

16 It's also, I think, an improper form of
17 discovery to ask the attorney to supply his
18 files rather than the files of the party.
19 In other words, for example, they ask for
20 documents related to Jeffrey Wigand who is a
21 plaintiff's witness in this case that is
22 going to appear in the next few days who
23 used to be an employee of Brown &
24 Williamson. And he's been on their witness
25 list since the start of this case.

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1 If they want Brown & Williamson's
2 documents related to Jeffrey Wigand, that's
3 a discovery request that should have been
4 gone to Brown & Williamson, who has always
5 been a party to this case since day one. It
6 should have gone to them within the time,
7 substantial time allotted by the Court for
8 discovery. To serve an attorney for an
9 adverse party who comes to Indiana to assist
10 in the defense of this case and to ask him
11 for his work product and to ask him for his
12 files and his firm's files related, for
13 instance, just to that one matter, is
14 improper, Your Honor.

15 This is also subject to being quashed
16 pursuant to Rule 45(b), because it is
17 clearly unreasonable and oppressive. That
18 subpoena requests without limitation the
19 files of Chadbourne & Parke related to three
20 or four tobacco companies. I would
21 represent to the Court as an officer of the
22 court that Chadbourne has represented many
23 of these tobacco companies for many years in
24 many phases and pieces of litigation
25 throughout the country. I can't even begin

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1 to estimate or guess what volume of
2 documents that are arguably within the scope
3 of that subpoena. It's untimely. It
4 attempts to invade attorney-client
5 privilege. It attempts to evade or invade
6 attorney-client work product. It attempts
7 to -- disobeys the Court's discovery orders
8 in this case, and it is unreasonable and
9 oppressive. And for all those reasons, Your
10 Honor, we would ask that the Court quash
11 this subpoena. Well, that's it.

12 I'll wait, Your Honor, and respond to
13 whatever justification, if any, plaintiffs
14 may offer for this. I haven't talked to
15 them about it. Maybe it was just one of
16 those 11th-hour things that they thought
17 they would do because they were feeling a
18 little frisky after a day in court.

19 I don't know. If it's a serious
20 effort, then I'll reserve any further
21 comments to hear what it is they have in the
22 way of justification for it.

23 THE COURT: Thank you, Mr.
24 Shockley. Oral motion to quash this
25 subpoena. Plaintiffs wish to be heard?

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1 MR. MOTLEY: Yes, Your Honor.
2 Your Honor, I have summonsed the copy
3 of a subpoena that we learned yesterday was
4 served by the defendant, Brown & Williamson,
5 upon the law firm of Mr. Sheffler on the
6 grounds that that law firm had wrongfully
7 withheld documents from Brown & Williamson
8 which are the subject of discovery disputes
9 that have been ongoing in the cigarette
10 litigation now for about five years. This
11 is the first time that I know of that a
12 defendant has sought to compel its former
13 law firm to cough up documents which the
14 Court in Minnesota has ordered them to be
15 produced.

16 I thought I had that order with me this
17 morning, Your Honor. I've sent for it. I
18 don't have it, and I would prefer, since we
19 don't seek to do anything with this today or
20 even this week, to let me make sure that I
21 dot my I's and cross my T's before I make
22 representations to Your Honor.

23 But this does arise, Your Honor, out of
24 this discovery war that's been going on all
25 over the country, including the state of
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1 Minnesota.
2 Your Honor may have access to
3 information, I don't know whether you follow
4 these different litigation, rulings around
5 the country, but on Wednesday the special
6 master in the state of Minnesota case
7 deprived 40,000 additional new documents
8 on grounds of crime fraud. Whether these
9 documents that are sought to be produced by
10 Brown & Williamson against Chadbourne &
11 Parke are included in these 40,000 is
12 unclear to us and until I get those orders,
13 I'm loathed to stand up and say anything.
14 We don't intend to do anything about this
15 today in any event.

16 THE COURT: The subpoena is for
17 Tuesday the 17th.

18 MR. MOTLEY: And we certainly -- we
19 don't seek to compel Mr. Sheffler to be here
20 on Tuesday, the 17th. I just want to get
21 these facts correct before I represent to
22 you anything that we -- that we need to do
23 to be flexible or do that.

24 The rule that he pointed out, Your
25 Honor, we do believe Mr. Sheffler does have
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1 material information, and I'll go into that
2 when I get these other matters.

3 THE COURT: So you're suggesting,
4 Counselor, we can deal with this Tuesday
5 morning then?

6 MR. MOTLEY: Yes, Your Honor.

7 THE COURT: Mr. Shockley?

8 MR. SHOCKLEY: Mr. Sheffler is an
9 attorney in the state of New York. He needs
10 to know whether or not he is going to be
11 ordered by this Court to produce documents

12 and to be here to produce documents. They
13 served it last night, they chose Tuesday.
14 That wasn't my choice, I didn't suggest it.
15 I don't know why they did, but they served
16 him last night with that subpoena, and that
17 was their choice.

18 Now to stand up and say we're really
19 not ready to argue this, Your Honor, is
20 simply just not appropriate. If they served
21 it, they should have been ready to defend it
22 and the should have an argument to present
23 to the court this morning to justify that
24 subpoena. To ask for more time, and I don't
25 know what all this case in Minnesota has to

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1 do with the case here in front of Your
2 Honor, it sounded like -- and I'm not privy
3 to that litigation like Mr. Motley, but it
4 sounded like I was saying I think I'm going
5 to get those documents any way by way this
6 order of this special master and that's all
7 well and good, but it isn't this Court's job
8 in this case to enforce or intervene in or
9 whatever a dispute that apparently is
10 ongoing in Minnesota or between Brown &
11 Williamson and Chadbourne in Minnesota or
12 anywhere else.

13 We need to keep, I would suggest, Your
14 Honor, this case within the four corners of
15 this case. We had a discovery order back in
16 November, and it just simply hasn't been
17 obeyed and they chose Tuesday as the day
18 that Mr. Sheffler was supposed to be here
19 with these documents and we would request
20 the Court move to quash this today. They
21 have offered no justification to the Court.
22 If they can come back later with
23 justification and subpoena him again, and
24 then we'll go through this and we'll argue
25 it when, apparently, they're ready to argue

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1 it, but they shouldn't have served a
2 subpoena until they're ready to argue it and
3 justify it to the Court.

4 THE COURT: Mr. Ohlemeyer.

5 MR. OHLEMEYER: Very briefly, Your
6 Honor. I think the Court needs to deal with
7 this this morning, too, is they intend to
8 bring this Dr. Wigand in this afternoon and
9 they expect me to cross-examine him. It's
10 not fair for them to say we're going to
11 conduct discovery next week that might
12 affect your cross-examination today.

13 MR. MOTLEY: He's not coming today.

14 MR. OHLEMEYER: That solves one of
15 the problems, but I agree with everything
16 Mr. Shockley said. If at a later date they
17 think they have a good faith basis to do
18 this, they ought to do it, but they can't do
19 it now and to Court ought to do it now.

20 MR. MOTLEY: I'm almost shocked
21 that Mr. Ohlemeyer agrees with Mr. Shockley.
22 It must be the first time that's happened,

23 Judge, one agreed with the other.
24 Judge, I'll be glad to spread on the
25 record this whole sorted record of these
1361
1 defendants of some of these same law firms'
2 failure to comply with court orders among
3 the country which has resulted in, among
4 other things, \$100,000-a-day fine being
5 imposed against Brown & Williamson for
6 disobeying court orders which is what gave
7 rise to the Brown & Williamson subpoena on
8 Chadbourne & Parke, but I would respectfully
9 ask if we could deal with this at noontime
10 so that I could show Your Honor the
11 Minnesota papers which gave rise to what we
12 did last night.
13 THE COURT: Are you going to be
14 ready to argue it at noon?
15 MR. MOTLEY: Yes, Your Honor.
16 THE COURT: We'll argue it at noon.
17 I'll take it under advisement until noon
18 today. But Mr. Shockley makes a good point,
19 you've subpoenaed this man to be here at
20 8:30 Tuesday morning. So we'll deal with it
21 at noon today.
22 Bring in the jury.
23 Mr. Furr, will you conduct the
24 cross-examination from now on?
25 MR. FURR: Yes, Your Honor.

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1 MR. CASSELL: All rise.
2 (Jury present)
3 THE COURT: Be seated. Good
4 morning, ladies and gentlemen.
5 ALL: Good morning.
6 THE COURT: Jury appears in its
7 entirety together with three alternates.
8 As you know, we were in the midst of
9 cross-examination last evening with
10 Dr. Roggli. Is Dr. Roggli here?
11 MR. MOTLEY: Yes, Your Honor.
12 THE COURT: Sir, come forward.
13 Raise your right hand.
14 PLAINTIFFS' WITNESS, VICTOR LOUIS ROGGLI, SWORN
15 THE COURT: Be seated, please.
16 Would you again tell this jury your name,
17 sir.
18 THE WITNESS: Victor Louis Roggli.
19 THE COURT: All right. Mr. Furr.
20 MR. FURR: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. FURR:

23 Q Good morning, Dr. Roggli.
24 A Good morning.
25 Q My name is Jeff Furr. I live
ROGGLI-CROSS

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1 [DELETED].
2 A Yes.
3 Q Would have been easier to meet in Greensburg
4 to talk about this, wouldn't it?
5 A Probably.
6 Q I'm going to go into perhaps some of the

7 same general areas that Mr. Ohlemeyer went
8 into yesterday, but I'm going to try very
9 hard not to ask you any of the same
10 questions that Mr. Ohlemeyer asked you. If
11 I do, you just let me know. Okay?
12 A Sure.
13 Q When Mr. Motley was questioning you, I
14 believe it was Wednesday morning, you
15 testified about six factors that you said
16 that you had used to distinguish the
17 likelihood that Mrs. Wiley's cancer was a
18 cancer that began in the lung versus a
19 cancer that began in the pancreas. Do you
20 recall that?
21 A Yes, sir.
22 Q And one of those factors was something that
23 you called immunostaining. Is that correct?
24 A Yes.
25 Q I believe you said that Dr. Cagle had

ROGGLI-CROSS

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1 performed three different immunostains on
2 tissue from Mrs. Wiley's lung. Is that
3 right?
4 A That's my understanding.
5 Q It's your understanding that he performed a
6 test called a CA199 stain?
7 A Yes, sir.
8 Q He also performed a test called a
9 cytokeratin 7 stain?
10 A Yes, sir.
11 Q And a cytokeratin 20 stain?
12 A Yes, sir.
13 Q Now, you're using these tests to provide at
14 least some evidence, in your opinion, that
15 Mrs. Wiley's cancer was more likely to have
16 begun in the lung than in the pancreas;
17 right?
18 A I think that that immunostain was the very
19 softest evidence in that regard, but as I
20 indicated on Wednesday, I thought that it
21 slightly favored a lung origin.
22 Q Let's see how soft it is. The CA199 stain
23 on Mrs. Wiley's lung tissue was positive,
24 wasn't it?
25 A Yes, sir.

ROGGLI-CROSS

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1 Q Now, cancers that begin in the pancreas --
2 THE COURT: We're getting a little
3 feedback, Counselor. We're going to try to
4 move that mike a little bit. Sorry.
5 Q Let me start again. Cancer that begins in
6 the pancreas, that is, a cancer primary to
7 the pancreas, can also test positive on a
8 CA199 stain, can't it?
9 A Sure.
10 Q And, in fact, a cancer that begins in a
11 breast, a primary breast cancer, could also
12 test positive on a CA199 stain, couldn't it?
13 A Sure.
14 Q The cytokeratin 7 stain on Mrs. Wiley's
15 tissue was positive, wasn't it?

16 A Yes.
17 Q A cancer that begins in the pancreas, a
18 primary pancreatic tumor, can also test
19 positive on cytokeratin 7, can't it?
20 A It can.
21 Q Same for primary breast cancer?
22 A It can.
23 Q Last test was cytokeratin 20; right?
24 A Yes.
25 Q Now, Mrs. Wiley's tumor was negative for
ROGGLI-CROSS
1366
1 cytokeratin 20, wasn't it?
2 A Yes.
3 Q And a cancer that begins in the pancreas can
4 also test negative on cytokeratin 20, can't
5 it?
6 A It can.
7 Q Same thing for breast cancer?
8 A Yes.
9 Q All right. As you said, it's pretty weak
10 evidence for determining whether or not the
11 cancer began in the lung versus the
12 pancreas; isn't it?
13 A Well, as we indicated, I said that various
14 tumors can stain various ways. It's typical
15 for lung cancer to be positive for
16 cytokeratin 7 and negative for cytokeratin
17 20. You can see that pattern in cancers of
18 the pancreas, but it's less common than the
19 reverse pattern.
20 Q Okay. Now, Mr. Ohlemeyer let the cat out of
21 the bag a little bit yesterday. I want to
22 talk to you about the P53 evidence.
23 A Sure.
24 Q The P53 evidence was another of the factors
25 on your chart that you were using to
ROGGLI-CROSS
1367
1 distinguish the likelihood that Mrs. Wiley's
2 cancer began in her lung versus the
3 likelihood that it began in the pancreas;
4 wasn't it?
5 A Yes.
6 Q Dr. Cagle did the P53 testing, didn't he?
7 A Yes, sir.
8 Q None of the P53 testing was done at Duke,
9 was it?
10 A That's correct.
11 Q You weren't involved in any of the P53
12 testing?
13 A Only in suggesting that Dr. Cagle's
14 laboratory do it.
15 Q You weren't involved in the actual
16 performance of the test, were you?
17 A I was not.
18 Q When did Mrs. Wiley die?
19 A 1991.
20 Q And when was this lawsuit filed?
21 A Sometime in '93, I believe.
22 Q Would you tell the jury when the P53 testing
23 was done, please.
24 A Sometime last year, '97.

25 Q October of '97, wasn't it?
ROGGLI-CROSS
1368
1 A Sounds right.
2 Q Four months ago?
3 A Yes, sir.
4 Q Let me make sure I understand your testimony
5 about the P53 testing, Dr. Roggli. Your
6 testimony is that Dr. Cagle found a very
7 specific mutation, that is a P53 codon 157 G
8 to T transversion; is that right?
9 A Yes.
10 Q And your testimony is that that, the finding
11 of that mutation provides evidence that Mrs.
12 Wiley's cancer was primary to the lung and
13 related to tobacco smoke; is that right?
14 A Yes, sir.
15 Q I want to discuss with you first the results
16 of Dr. Cagle's testing. You testified
17 yesterday, I think, that Dr. Cagle had been
18 able to replicate his results; is that
19 right?
20 A Dr. Cagle had told me personally that before
21 he would write a report in the case, he
22 wanted to be sure the results were correct
23 and wanted to have them double checked.
24 Q Isn't it a fact, Dr. Roggli, that Dr. Cagle
25 performed 11 different P53 analyses on 11

ROGGLI-CROSS
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1 different sections of Mrs. Wiley's tumor and
2 he found this mutation that you're
3 testifying about in only one of them?
4 A I'm not aware of that.
5 Q You're not aware of that?
6 A No, sir.
7 Q Well, let me hand you, Dr. Roggli, what
8 we've marked as Defendants' Exhibit R121ID
9 through R131ID. I believe there are 11 of
10 them.
11 A Sure.
12 Q Just let me know after you've glanced at
13 them, please.
14 A Okay.
15 Q Dr. Roggli, have you ever seen those
16 analyses before?
17 A I have seen the exhibits to Dr. Cagle's
18 deposition. I believe that these were
19 included in it, yes, sir.
20 Q Since you've seen those, I want to walk
21 through those with you. Okay?
22 A Sure.
23 Q Can you see that, Dr. Roggli?
24 A Yes.
25 Q I want to ask you to help me fill in this

ROGGLI-CROSS
1370
1 chart, Dr. Roggli. I believe the first
2 exhibit, which is 121, would indicate that
3 it was an analysis performed on sample 25.
4 Is that correct?
5 A That would appear to be so.
6 Q Let's walk through what was found on sample

7 25. It was conducted between October 23rd
8 and October 24th of 1997, wasn't it? In the
9 right-hand upper corner of the paper I
10 believe, Doctor.
11 A Well, there's a date October 24, 1997, 6:04
12 p.m. and October 25, 1997, 7:58 a.m. I
13 don't know whether that means when it was
14 conducted or what that time refers to.
15 Q Are you familiar with how PCR amplification
16 and DNA sequencing is performed?
17 A In a very rudimentary way, yes.
18 Q You are aware that the process of isolating
19 DNA from a paraffin block and amplifying the
20 DNA so that it can be used to sequence is a
21 process that takes about 12 to 14 hours?
22 A It takes time, but I was not aware of the
23 exact sequence of time that it takes.
24 Q But the time indicated on that sheet is
25 consistent with your understanding of how a

ROGGLI-CROSS

1371

1 PCR would be conducted, isn't it?
2 A It could be consistent with a lot of things.
3 I suppose it's consistent with that.
4 Q I should have asked you this before. We've
5 been talking about the P53 gene. The P53
6 gene contains -- can be broken down into
7 subparts, can't it?
8 A Yes.
9 Q One of those subunits of the gene is called
10 an exon?
11 A Yes.
12 Q Would you explain to the jury what an exon
13 is.
14 A Well, in the DNA you have various segments
15 that are called exons and introns, and
16 within the exons and introns there are
17 individual spelling units we talked about
18 which are called codons. And the exons are
19 the part of the gene which is actually
20 transcribing codes in order to make the
21 protein in the cytoplasm that we talked
22 about.
23 Q Dr. Roggli, how many exons are found on the
24 P53 gene?
25 A I've forgotten, there's a number but I've

ROGGLI-CROSS

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1 forgotten the exact.
2 Q If I would represent to you that 11 were
3 found in the P53 gene, would that refresh
4 your memory?
5 A That sounds reasonable.
6 Q Sample 25 came from block 32-91-15; right?
7 A It says sample 32-91-15, yes.
8 Q It says block number, doesn't it? Sample
9 25, block number 32-91-15.
10 A I don't see the word "block number" on here.
11 MR. FURR: May I approach, Your
12 Honor?
13 THE COURT: Yes.
14 Q It just says sample, doesn't it?
15 A Yes.

16 Q Okay, thank you. Doctor, that sheet
17 indicates that sample 25, on sample 25 a
18 forward analysis was conducted; is that
19 right?
20 A A what analysis?
21 Q Forward. It's in the writing on the top of
22 the sheet, I believe, Doctor.
23 A I don't see the word "forward."
24 Q Okay. Do you see an F?
25 A An F? I think you'll have to help me out

ROGGLI-CROSS

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1 with that. I don't see the F either.
2 Q Let me back up for a step first.
3 Are you familiar with the fact that on
4 DNA sequencing analyses, both forward and
5 reverse analyses can be conducted?
6 A Sure.
7 Q Would you explain why that's done for the
8 jury.
9 A I don't know why it's done, but the
10 forwardness has to do with the direction of
11 the DNA. It runs from what's called a 3' to
12 a 5' direction which is defined by the
13 orientation of the base pairs, the spelling
14 pairs in the molecule, and in one side of
15 DNA runs one direction and the other side of
16 DNA complementary runs the other direction,
17 but why they do it in both directions, we're
18 talking here about details of the P53
19 analysis that I've not performed myself and
20 I'm not familiar.
21 Q Okay. Will you tell me whether a mutation
22 was found on sample 25, and if so, what type
23 of mutation?
24 A Mutation No. 1 seems to be indicating that
25 there was a codon 139.

ROGGLI-CROSS

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1 Q Could you go to what's been marked I believe
2 would be Defendants' R12ID. That's for
3 sample 29, isn't it?
4 A Yes.
5 Q Again it was conducted on October 23rd
6 through 24th?
7 A Yes.
8 Q Again on exon 5?
9 A The first one was labeled exon 5. I don't
10 see the word exon 5 on this. I do see 5EA
11 listed at the top.
12 Q Do you not understand that to be an
13 abbreviation used by molecular biologists
14 for exon 5?
15 A 5EA?
16 Q Yes, sir.
17 A No, I'm not.
18 Q Was there a mutation found on sample 29?
19 A This one says no mutations.
20 Q I meant to ask you, what exon is codon 157
21 found on?
22 A On 5 or 6. I think it's in 5.
23 Q It's exon 5, isn't it?
24 A I think so.

25 Q Could you turn to the next, to Defendants'
ROGGLI-CROSS
1375
1 R123 for ID. That's an analysis that was
2 conducted on sample 24, isn't it?
3 A Yes, sir.
4 Q Again it was conducted same time period,
5 October 23rd through 24th.
6 A This one says 24th through 25th.
7 Q 24th through 25th?
8 A That's what it says.
9 Q That was also conducted on exon 5, wasn't
10 it?
11 A It says 5EA at the top again, so if that's
12 what that means, that's what it means.
13 Q And what type, if any, mutation was found on
14 that sample?
15 A It says no mutation.
16 Q Could you turn to Defendants' R124 for ID,
17 please. That is an analysis that was
18 conducted on sample No. 30, isn't it?
19 A Yes.
20 Q Again it was conducted on exon 5, wasn't it?
21 A Yes.
22 Q It was also conducted, that October 23rd
23 through 24th, wasn't it?
24 A Yes.
25 Q What type, if any, mutation was found on
ROGGLI-CROSS

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1 that sample, Doctor?
2 A This one, this one is labeled at the top of
3 being reverse, it says no mutation.
4 Q Could you turn to R125 for ID, please, sir.
5 A All right.
6 Q That's an analysis that was conducted on
7 sample 32, I believe.
8 A Correct.
9 Q And it was conducted on October 23rd through
10 24th?
11 A Correct.
12 Q Only this one was conducted on exon 6; is
13 that correct?
14 A It says 6EA at the top, so if that's what
15 that means, then that's correct.
16 Q What type, if any, mutation was found on
17 that sample?
18 A All I can see at the top it says mutation.
19 If there's a word no there, it's not on this
20 sample.
21 MR. FURR: May I approach again,
22 Your Honor?
23 THE COURT: Yes.
24 Q Okay. There was a mutation, but the
25 analysis doesn't say what type of mutation
ROGGLI-CROSS

1377
1 was found. Is that correct?
2 A Well, it may. There's a place here that
3 says G missing, which is one of the spelling
4 codons, so there may be a deletion there
5 that they're talking about. There's another
6 place on here where there is an arrow

7 pointing toward, looks like 230, and I don't
8 know what that particular arrow means.
9 There's another arrow pointing at about
10 207 on the same scan, and I don't know what
11 that means.
12 Q We know it wasn't a mutation on codon 157,
13 don't we?
14 A Well, this isn't even looking at codon 157.
15 It was looking at 6EA.
16 Q Right. Could you turn to the next analysis,
17 Doctor. I believe that would be R126 for
18 ID; is that right?
19 A Correct.
20 Q That's sample 31?
21 A Yes, sir.
22 Q Conducted same time?
23 A Correct.
24 Q This was also on exon 6, wasn't it?
25 A It says 6EA at the top.

ROGGLI-CROSS

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1 Q And what, if any, type of mutation was
2 found?
3 A It says no mutation.
4 Q Could you turn to R127 for ID, please, sir.
5 A Okay.
6 Q And that's for sample 22.1?
7 A Correct.
8 Q Now, this analysis was conducted
9 approximately four days later on October 28
10 through 29; is that right?
11 A The dates on here says October 28th to
12 October 29th, yes, sir.
13 Q And this is on exon 5?
14 A It says complete E5 at the top, so if that's
15 what that means, then that would be correct.
16 Q And what type, if any, mutation was found on
17 that sample?
18 A It says mutation No. 2 and it says, instead
19 of GT, it is TT. And I don't see exactly
20 which number that is in unless it's 129.
21 Q I believe, Doctor, that is the codon 157
22 mutation, isn't it?
23 A 157. I can't tell from reading this. As I
24 said before, I'm not familiar with reading
25 these particular graphs. I've not done that

ROGGLI-CROSS

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1 before and it's not my area of expertise.
2 Q Let me -- before we go on, Doctor, maybe
3 this is the wrong approach. Is it correct
4 that you really can't read these to
5 determine whether or not they reflect a
6 mutation?
7 A That's absolutely correct.
8 Q Okay. Maybe this isn't what we should be
9 doing then.
10 Doctor, you knew that these sequence
11 analyses were in existence, didn't you?
12 A Yes, sir.
13 Q Were they provided to you?
14 A They were included, as I indicated before,
15 as the exhibits to Dr. Cagle's deposition.

16 Q You, obviously, didn't try to interpret them
17 for yourself, did you?
18 A That's correct.
19 Q Did you take them to any other molecular
20 biologist and ask to have them interpreted?
21 A No, sir.
22 Q So, in essence, when you tell us that there
23 was a mutation at codon 157 of Mrs. Wiley's
24 P53 gene, all you're really doing is
25 repeating what Dr. Cagle said to you; isn't

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1 it?
2 A And what he said in his report that I read
3 and in his deposition which I read.
4 Q You took no steps whatsoever to evaluate the
5 materials he provided to verify whether, in
6 fact, he had found such a mutation, did you?
7 A Well, I took the steps to determine whether
8 the mutation was present, which was with
9 Dr. Cagle, who I thought was the most
10 capable person to do that analysis in the
11 United States.
12 Q That's not my question. My question is you
13 took no steps whatsoever to evaluate whether
14 the materials produced to you actually
15 supported what Dr. Cagle told you that he
16 was finding.
17 A You mean did I try to independently verify
18 Dr. Cagle's interpretation? The answer to
19 that is no, I did not.
20 Q And you're also aware that the results that
21 Dr. Cagle reports finding were not verified
22 by any independent laboratory, don't you?
23 A I don't know if that's the case or not. I
24 know that Dr. Cagle had told me that he
25 wanted to show the scans to another

ROGGLI-CROSS

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1 molecular biologist at Baylor who had a lot
2 of experience in that, and that was my
3 interpretation of what he meant by
4 replication of the results.
5 Q But you're aware that the analyses
6 themselves were never sent out to another
7 laboratory to determine whether or not they
8 could be replicated, aren't you?
9 A I don't know whether that happened or not.
10 I'm not aware of that.
11 Q You may have already answered this,
12 Dr. Roggli, but in addition to telling you
13 that he had found a mutation at codon 157,
14 did Dr. Cagle tell you that he had found any
15 other mutations in Mrs. Wiley's lung cancer?
16 A Yes, sir, I believe there were two mutations
17 in codon 5 and one in codon 6, as I recall.
18 Q What was the other mutation in codon 5?
19 A There was, I believe there was a 213
20 mutation and I don't remember whether that
21 was in codon 5 or 6.
22 Q That would be in codon 6, wouldn't it?
23 A I'm not sure.
24 Q Do you recall the other mutation?

25 A No, sir.

ROGGLI-CROSS

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1 Q Let's talk about the 213 mutation. That's
2 not a spot -- that's not a site that's
3 associated with tobacco smoke exposure, is
4 it, Doctor?
5 A I think that's a matter of interpretation.
6 It's not one of the holiest spots, but if
7 you look at the, from the database, P53
8 database for lung tumors, there is
9 definitely a spike at 213.
10 Q Doctor, I thought you told us yesterday that
11 you've never looked at the P53 database.
12 A No, but I've seen printed in articles graphs
13 that have been -- that have been produced
14 from the P53 database.
15 Q Doctor, I'd like for you to, if you can,
16 cite to this jury a single scientific
17 article that reports a spike at 213 for
18 tobacco exposure.
19 A Well, I've seen -- there's two graphs that
20 I've seen in this regard. One was that
21 which was in the report which Dr. Carchman
22 relied upon.
23 Q Excuse me?
24 A Which Dr. Carchman relied upon. The report
25 of the analysis in this particular case,

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1 there was a graph that showed the spikes
2 that had been related to P53 mutations in
3 lung tumors excluding those associated with
4 radon and excluded maybe one other thing.
5 Maybe it was environmental tobacco smoke,
6 maybe it was in nonsmokers.
7 Then I've seen the graph that was
8 published in the Denissenko article in
9 Science. I don't remember which one of
10 those showed the 213 spike but one of them
11 shows that.
12 Q We'll get to the Denissenko article later.
13 Let me make sure I understand, though.
14 It's your testimony that some of the
15 materials that Dr. Carchman indicated he's
16 talking about -- I take it you're talking
17 about his deposition?
18 A Yes, the exhibits to the deposition.
19 Q And the exhibits to his deposition
20 demonstrate a spike at codon 213 for tobacco
21 smoke exposure?
22 A There is a spike that is higher than a lot
23 of the peaks around it at 213.
24 Q Dr. Roggli, the analysis, the DNA
25 sequencing, amplification and sequencing is

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1 basically an analytical procedure, isn't it?
2 A Yes, sir.
3 Q And in all analytical procedures there is
4 some chance of error, isn't there?
5 A Sure.
6 Q One type of error is known as a false

7 positive error?
8 A Could be, yes, sir.
9 Q Would you explain to the jury what a false
10 positive error is, please.
11 A False positive means that when you get a
12 positive result when it is actually in the
13 specimen in negative.
14 Q Now, PCR sequencing and analysis are very
15 sensitive analyses, aren't they?
16 A Yes, sir.
17 Q It takes only a miniscule amount of DNA to
18 conduct those analyses, doesn't it?
19 A Correct.
20 Q The potential for contamination requires
21 very careful attention to detail when PCR
22 amplification and sequencing is being
23 conducted, doesn't it?
24 A Sure.
25 Q You told us it wasn't your laboratory and,
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1 obviously, you weren't present and didn't
2 supervise these analyses as they were being
3 conducted, did you?
4 A That's correct.
5 Q Let me ask you to define another term.
6 Would you explain to the jury what a
7 negative control is in an analytical
8 procedure.
9 A Negative control is when you run a specimen
10 that you know to be negative along with a
11 specimen that you're testing.
12 Q And in the analysis of Mrs. --
13 Why are negative controls used?
14 A Negative controls are used in part to make
15 sure that you aren't getting a false
16 positive result.
17 Q And one of the reasons that you could be
18 getting a false positive result could be
19 contamination, wouldn't it?
20 A Sure.
21 Q In the analysis of Mrs. Wiley's lung tissue
22 in the P53 analysis, Dr. Cagle's laboratory
23 didn't use a negative control, did they?
24 A I don't know.
25 Q What is the error rate for false positives
ROGGLI-CROSS

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1 in Dr. Cagle's laboratory?
2 A I don't know.
3 Q Let's back up and talk about mutations on a
4 more general level, Dr. Roggli. There are a
5 variety of factors that can produce
6 mutations, aren't there?
7 A Sure.
8 Q And those factors would include exposures to
9 external chemicals?
10 A Yes.
11 Q And the body -- the human body itself also,
12 as a part of the natural endogenous
13 processes that we all have ongoing, like
14 metabolism, produces mutations, doesn't it?
15 A Well, certainly mutations occur normally in

16 the human body; whether they're due to
17 endogenous processes or low level exogenous
18 exposures that we all have, such, for
19 example, as cosmic rays, I don't know. I'm
20 not sure that anybody knows.

21 Q Dr. Roggli, how many cells are there in the
22 human body?

23 A There are trillions of cells.

24 Q Trillions. Have I got the right number of
25 zeros for one trillion, Dr. Roggli?

ROGGLI-CROSS

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1 A Yes, sir.

2 Q Now, each of the cells in the human body is
3 thought to undergo up to 10 to 20,000
4 mutations every single day; isn't that
5 right?

6 A I don't think that's correct.

7 Q How many a day?

8 A Well, depends on which cell you're talking
9 about. There are cells in the human body
10 that don't undergo, that are permanent cells
11 that don't undergo cell division at all, and
12 those would not have mutations present in
13 them at all because they don't undergo
14 division.

15 Then there is going to be cells that
16 multiply very slowly. And then there are
17 going to be cells that multiply rapidly.
18 And the cells that multiply rapidly are more
19 likely to have mistakes that occur and have
20 mutations in them than the cells that
21 multiply more slowly and certainly more than
22 the ones that don't multiply at all.

23 So I don't think you can give an
24 average number to the cell in the human body
25 that has any meaning to it.

ROGGLI-CROSS

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1 Q Where do cells in the lung fit in on that
2 scheme that you just outlined for us?

3 A In all three categories.

4 Q In all three categories?

5 A Yes, sir.

6 Q You and Mr. Ohlemeyer discussed yesterday
7 that tumors from many different sites in the
8 body can metastasize to the lungs. Do you
9 recall that?

10 A Yes.

11 Q And I believe you said that the primary
12 pancreatic could metastasize to the lungs?

13 A Yes.

14 Q As well as primary breast tumors?

15 A Correct.

16 Q Now, Dr. Cagle never performed any analysis
17 on the -- any P53 analysis on the tissue
18 from Mrs. Wiley's pancreas, did he?

19 A Not that I'm aware of.

20 Q In fact, he never performed any P53 analysis
21 on the tissue from any of the tumors or
22 sites in Mrs. Wiley's body other than the
23 lung; is that right?

24 A That's my understanding.

25 Q So we really don't know whether she had
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1 mutations in the other cancers, do we?
2 A Well, it would be very unlikely that there
3 were not P53 mutations in the metastatic
4 deposits if there were P53 mutations in the
5 primary lung cancer.
6 Q And that's because, if a primary tumor has a
7 mutation, it's likely that the metastatic
8 secondary tumor would carry that same
9 mutation, isn't it?
10 A Most of the time. There can be additional
11 things that happen to the cell as it
12 metastasizes that it could lose a mutation,
13 could lose a whole chromosome E, for
14 example.
15 Q It could also gain mutations as it
16 metastasizes?
17 A Correct.
18 Q In fact, as cancers progress, they become
19 very unstable genetically, don't they?
20 A Yes, sir.
21 Q And they begin developing mutations at a
22 more rapid rate than they would have
23 otherwise due to that genetic instability.
24 A That's correct.
25 Q In fact, they begin developing mutations

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1 that actually aren't related to the
2 causation of the cancer but are occurring as
3 a result of the genetic instability of the
4 cancer; is that right?
5 A That's correct.
6 Q If someone had a primary pancreatic cancer
7 with a P53 mutation, and it metastasized to
8 the lung, you would expect to see that
9 mutation in the lung you just told us, I
10 think.
11 A Yes, sir.
12 Q Same for a primary breast cancer that
13 metastasized to the lung?
14 A Yes, sir.
15 Q Because of this genetic instability, it
16 would also be possible for a P53 mutation to
17 be produced in a lung metastasis that was
18 not present in the primary tumor.
19 A That would be possible, yes, sir.
20 Q I want to talk to you, Dr. Roggli, about the
21 general topic of the occurrence of P53
22 mutations in lung cancer.
23 A Sure.
24 Q And I want to begin by asking you some very
25 specific questions about nonsmokers. First,

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1 I'd like for you to tell the jury what
2 percentage of nonsmokers with adenocarcinoma
3 of the lung have a P53 mutation and a codon
4 157 G to T transversion.
5 A I don't think any data is available on the
6 latter part on the percentage of nonsmokers

7 that have a G to T transversion in 157, at
8 least not that I'm aware of. The percentage
9 of P53 mutations in adenocarcinomas in
10 nonsmokers is lower than it is in smokers.
11 Q Are you talking about P53 mutations in
12 general now?
13 A Yes.
14 Q As opposed to the specific mutation that
15 you're relying upon?
16 A Yes.
17 Q What is the percentage of P53 mutations in
18 nonsmokers with lung cancer in general?
19 A I think that's going to vary somewhat from
20 study to study. I think the numbers that
21 I've heard for primary lung cancers that are
22 smoking related is about 60 percent, and for
23 the lung cancers that occur in nonsmokers,
24 it's less than that.
25 Q How much less?

ROGGLI-CROSS

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1 A Don't know. I think it varies from study to
2 study.
3 Q And you've never looked at the P53
4 databases, you've told us, to try to analyze
5 that issue?
6 A That's correct.
7 Q Dr. Roggli, in this case you're attempting
8 to use the P53 codon 157 G to T transversion
9 mutation to distinguish a case of cancer in
10 a nonsmoker to indicate that it was caused
11 by exposure to tobacco smoke, environmental
12 tobacco smoke, as opposed to some other
13 factor; is that right?
14 A I think that's a factor that I've considered
15 in this case.
16 Q Dr. Roggli, isn't it true that there are
17 absolutely no studies that demonstrate that
18 nonsmokers exposed to environmental tobacco
19 smoke with lung cancer have a higher
20 incidence of P53 codon 157 G to T
21 transversions than nonsmokers with lung
22 cancer not exposed to tobacco smoke?
23 A I don't think that's been studied. I think
24 that what has been studied is that tobacco
25 smoke initiates that particular mutation in

ROGGLI-CROSS

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1 lung cancers, and that the occurrence of
2 such a mutation in a lung cancer in an
3 individual who is a nonsmoker who is exposed
4 to environmental tobacco smoke would be
5 supportive evidence that environmental
6 tobacco smoke actually contributed to that
7 lung cancer.
8 Q So the answer to my question is no, there
9 are no studies?
10 A Nobody has done the studies, yes, sir,
11 that's correct.
12 Q There are no studies that indicate how
13 frequent this mutation is in nonsmokers
14 exposed to environmental tobacco smoke.
15 A Not that I'm aware of, no, sir.

16 Q There are no studies that indicate how
17 frequent this mutation is in nonsmokers not
18 exposed to spoke.
19 A I think that's correct.
20 Q And so there is no direct epidemiologic
21 evidence that this mutation actually occurs
22 in nonsmokers with lung cancer that have
23 been exposed to environmental tobacco smoke;
24 is there?

25 A Well, epidemiologic evidence certainly, I
ROGGLI-CROSS

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1 mean, when you start talking about
2 epidemiology, you're talking about comparing
3 groups of patients. And the number of
4 patients out there with adenocarcinoma of
5 the lung which have been identified with a
6 good occupational or household exposure to
7 environmental tobacco smoke is at present
8 too small to subject to an epidemiologic
9 study.

10 Q Lung cancer in nonsmokers is a rare disease,
11 isn't it?

12 A It's relatively rare. I think that about
13 roughly, from my own experience, it's about
14 5 percent of cases. It's been described in
15 the literature to be as many as 15 and
16 probably more than 90 percent of the cases
17 are in smokers.

18 Q Now, P53 mutations, I'm talking about P53
19 mutations in general, are the most common
20 type of mutation in human cancers, aren't
21 they?

22 A That's been said, yes, sir.

23 Q In fact, they occur in nearly 100 percent of
24 breast cancers, don't they?

25 A I know that they're frequent in breast
ROGGLI-CROSS

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1 cancers. I'm not aware of the exact
2 percentage.

3 Q Don't they occur in somewhere between 40 and
4 50 percent of primary pancreatic cancers?

5 A I think they're quite common in pancreatic
6 cancers, yes, sir.

7 Q Let's go back to this P53 database. We've
8 talked about it. We've never really
9 explained what it is. Now, the P53 database
10 is a database that was created by a
11 Dr. Holstein; is that correct?

12 A I'm not sure who the creator was.

13 Q You're not sure who created it?

14 A Correct.

15 Q It is a database that is available on the
16 Internet, I believe you told us yesterday.

17 A That's my understanding, yes.

18 Q In fact, it is the world's largest database
19 containing information related to the
20 occurrence of mutations at the P53 gene in
21 cases of cancer, isn't it?

22 A I believe that's correct, yes, sir.

23 Q It is a valuable research tool for analyzing
24 the pattern of P53 mutations that occur in

25 cases of cancer, isn't it?
ROGGLI-CROSS
1396

1 A Sure.
2 Q It contains upward of 8,000 case reports,
3 doesn't it?
4 A I don't know how many cases are in it.
5 Q You told us you didn't know who originated
6 the database but you do know that now the
7 International Agency for Research on Cancer
8 maintains the database to ensure the
9 uniformity and integrity of the information
10 entered in the database, don't you?
11 A That's my understanding, yes, sir.
12 Q Dr. Roggli, on Wednesday you indicated that
13 this precise mutation, this P53 codon 157 G
14 to T transversion is a mutation, and you
15 said that is highly associated with
16 tobacco-induced lung cancer; is that right?
17 A Yes, sir.
18 Q Dr. Roggli, what percentage of
19 adenocarcinomas in the U. S. do you believe
20 are related to tobacco smoke?
21 A More than 90 percent.
22 Q 90 percent.
23 A Yes, sir.
24 Q Well, Dr. Roggli, isn't it true that in less
25 than 2 percent of the cases of primary

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1 adenocarcinoma of the lung have this
2 mutation?
3 A Well, I think the answer to that is yes, but
4 you need to put that in perspective, though.
5 The perspective being that, for any one of
6 the hot spots, the highest percentage that's
7 been identified is like 6 percent.
8 Q So this mutation that you've described as
9 being highly associated, in fact, occurs 2
10 percent of the time?
11 A Yes.
12 Q I want to go back for a minute, Dr. Roggli,
13 and take a look at the Science article that
14 you and Mr. Motley discussed Wednesday
15 morning.
16 MR. FURR: Do you have that,
17 Mr. Cassell? I believe it was marked.
18 May I approach, Your Honor?
19 THE COURT: Yes.
20 Q Dr. Roggli, I'm handing you Plaintiffs'
21 Exhibit 16206. That's the Science article
22 you and Mr. Motley talked about, isn't it?
23 A Yes, it is.
24 Q That's the article you talked about as
25 indicating that benzo(a)pyrene from

ROGGLI-CROSS
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1 cigarette smoke supported your theory that
2 benzo(a)pyrene in cigarette smoke produced
3 mutations at codon 157 specifically; right?
4 A I didn't quite follow that question. Could
5 you repeat that?
6 Q This is one of the sources of information

7 that you indicated supported your opinion
8 about Mrs. Wiley's mutation.
9 A Yes.
10 Q Now, that study was done in cell cultures,
11 not in human beings; is that right?
12 A It was done in cells, some of which had been
13 isolated from human beings, but not in
14 intact human beings; that's correct.
15 Q This wasn't cancer cells this was being done
16 in.
17 A The HeLa cell is, I believe, a cancer cell.
18 It's derived from a cervical cancer cell
19 line.
20 Q This wasn't a study of lung cancer cells,
21 was it?
22 A It was not a study of lung cancer cells;
23 that's correct.
24 Q Now, Denissenko didn't actually look at
25 mutations in the study, did he?

ROGGLI-CROSS

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1 A No, he looked at the adduct formation and
2 where it occurred in P53 DE.
3 Q An adduct is simply a place on the DNA where
4 a substance sticks to the DNA; is that
5 right?
6 A Well, it more than sticks to it. My
7 understanding is it forms irreversible
8 covalent bonds with the DNA.
9 Q Now, it is possible to do studies of DNA
10 adducts in human tissue.
11 A That's been done.
12 Q That study wasn't done in Mrs. Wiley's
13 tissue, was it?
14 A Not that I know of.
15 Q Dr. Roggli, there have been a number of
16 studies of the incidence of adducts observed
17 in the tissues of nonsmokers exposed to
18 environmental tobacco smoke, haven't there?
19 A I think there have been studies in that
20 regard, yes.
21 Q Isn't it true that not a single one of those
22 studies shows a statistically significant
23 increase in the number of adducts in the
24 lung, in tissue of nonsmokers exposed to
25 tobacco smoke?

ROGGLI-CROSS

1400

1 A I don't know. Not aware of that data.
2 Q You're not familiar with that data?
3 A No, sir.
4 Q This Denissenko Science article, this wasn't
5 a study of cigarette smoke either, was it?
6 A No, sir.
7 Q I think you told us yesterday that it wasn't
8 even a study of a chemical that actually
9 appears in tobacco smoke?
10 A That's correct.
11 Q It was a study of a metabolite of one of the
12 chemicals that appears in tobacco smoke.
13 A That is correct.
14 Q Now, what Denissenko did was they poured
15 this highly concentrated BPDE onto these

16 tissue cultures and examined where the
17 adducts were formed; is that right?
18 A I don't know what you mean by highly
19 concentrated. Let's see what the actual
20 levels they used were, if they are even
21 mentioned in the manuscript. He actually
22 says HeLa cells were treated with various
23 concentrations of P53 BPDE and gives
24 negative resistance 9 for a source for that.
25 Q Can you compare the amounts of BPDE that

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1401

1 Dr. Denissenko used in that study to the
2 amount of BPDE that a nonsmoker would form
3 from exposure to benzo(a)pyrene in a typical
4 environment where smoking was permitted?
5 A I don't think it's possible to make such an
6 extrapolation based on information I have
7 available to me.
8 Q It's not possible for you to do it?
9 A Correct.
10 Q You're not saying it wouldn't be possible
11 for others to do it, are you?
12 A I don't know if it would be possible or not.
13 Q That chemistry, that's really not one of
14 your areas of expertise, is it?
15 A Well, I was a biochemistry major at Rice.
16 That was what my major undergraduate major
17 was. I think the problem with such a study
18 would be that BPDE is a metabolite and it's
19 going to vary from individual to individual
20 how much BPDE is made from benzo(a)pyrene
21 that they're exposed to. So as you asked
22 the question, I don't think it would be
23 possible to do that study or make such an
24 extrapolation.
25 Q And we certainly wouldn't know the rate at

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1 which Mrs. Wiley metabolized benzo(a)pyrene
2 to BPDE, would we?
3 A I don't know specifically that, no, sir.
4 Q Could you pick the article up again, Doctor,
5 if you would, please, and I would like to
6 talk to you about the results for a moment
7 that Dr. Denissenko found. Maybe I could
8 direct your attention to page 431, take a
9 look at the graph.
10 A Yes.
11 Q That graph indicates the locations on the
12 DNA that Denissenko found to be a hotspot;
13 is that right?
14 A Yes. He has three particular ones that he
15 labeled that were related to the BPDE.
16 Q And when we say hotspot, we're referring to
17 sites, the adjective "hot" means it's one of
18 the sites that the DNA adducted, that the
19 benzo(a)pyrene formed adducts at a higher
20 rate than at other sites; is that right?
21 A Yes.
22 Q What was the hottest site?
23 A Well, if I understand the figure 1
24 correctly -- let's see, figure 1 is the

25 actual information from the P53 database.
ROGGLI-CROSS
1403
1 You were referring to figure 2?
2 Q I was referring to the graph on page 431.
3 A Are you talking about figure 1?
4 Q Let me pull it out. Yes.
5 A Well, that graph doesn't talk about the hot
6 sites for BPDE adducts, I don't believe. It
7 talks about the hotspots for P53 mutations
8 in lung cancer by codon position from the
9 P53 database.
10 Q Okay. What was the -- what is the number
11 one spot for P53 mutations?
12 A 273, codon 273 is number one.
13 Q Mrs. Wiley didn't have a mutation in 273,
14 did she?
15 A None was found there.
16 Q And what was the second most prevalent
17 location at which P53 mutations occur in
18 lung cancer?
19 A 248.
20 Q And Mrs. Wiley, no mutation was found at 248
21 for Mrs. Wiley?
22 A No, sir.
23 Q Okay. And -- all right.
24 We spoke earlier about the fact that
25 the P53 gene contains 11 exons; is that

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1404
1 right?
2 A Yes, you mentioned that.
3 Q And Dr. Cagle amplified and analyzed only
4 exons 5 and 6 of the P53 gene, didn't he?
5 A That's correct.
6 Q Now, isn't it true, Doctor, that there is a
7 hotspot for mutations that are believed to
8 be related to radon exposure found on exon
9 7?
10 A I don't know.
11 Q That's not something you're familiar with?
12 A That's correct.
13 Q You do know that Dr. Cagle didn't analyze
14 exon 7, don't you?
15 A That's my understanding.
16 Q Having read his deposition you also know
17 that Dr. Cagle was aware that radon is an
18 issue in this case, aren't you?
19 A Let's see. I don't remember the questions
20 that were specifically asked him about
21 radon, and I don't know if he was aware of
22 that issue prior to his deposition or not.
23 Q But if you wanted -- strike that.
24 On a number of occasions you have
25 testified that there are over 50 carcinogens

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1405
1 in tobacco smoke; is that right?
2 A Yes.
3 Q Is there a way to make a cigarette whose
4 smoke doesn't contain that 50 carcinogens or
5 contains them in a greatly reduced amount?
6 A Yes.

7 Q How would that be done?
8 A Well, there's a number of ways to go about
9 doing that.
10 Q Now, you're familiar with a cigarette of the
11 RJ Reynolds Tobacco Company known as the
12 Premiere cigarette, aren't you?
13 A Yes.
14 Q That Cigarette contained a radical new
15 technology, space-age type components for
16 which the machines to make those components
17 had to be invented before the cigarette
18 could be made; is that right?
19 A Well, I don't know about the
20 characterization about space-age type, but
21 certainly I think it was a novel technology.
22 Q And that technology was developed during the
23 1980s; right?
24 A That's my understanding.
25 Q That technology was not available before the

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1 1980s, was it?
2 A I don't know.
3 Q Now, when the Premiere cigarette is smoked,
4 it delivers substantially less tar to the
5 smoker, doesn't it?
6 A That's my understanding, yes.
7 Q It also creates substantially less
8 environmental tobacco smoke, doesn't it?
9 A That's also my understanding.
10 Q Now, for these 50 substances that you've
11 described as carcinogens, those substances
12 are reduced by over 90 percent in the
13 sidestream smoke of the Premiere cigarette,
14 weren't they?
15 A They reduced. I'm not familiar with the
16 numbers or percentages.
17 Q Did you ever review the Premiere monograph
18 that RJ Reynolds prepared?
19 A I don't recall if I've seen that or not. I
20 probably have in the many, many documents
21 that I've been seeing at various occasions
22 but I just don't recall.
23 Q Have you ever seen this book, Doctor?
24 A No, I haven't seen that whole book, no, sir.
25 Q You do believe that if current smokers had

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1 switched their smoking habits and had begun
2 using the Premiere cigarette, that a
3 substantial -- that the numbers of lung
4 cancers would have gone down among smokers,
5 don't you?
6 A That's probably true.
7 Q You also believe that this environmental
8 tobacco smoke that the Premiere cigarette
9 generated would have been less risky for the
10 nonsmoker than traditional cigarettes, don't
11 you?
12 A Well, if those numbers are correct, that
13 would be true.
14 Q Now, despite all that, the public health
15 community opposed the introduction of the

16 Premiere cigarette, didn't it?
17 A That's my understanding.
18 Q Although that wasn't really the biggest
19 problem. The biggest problem was that the
20 consumers rejected the cigarette also,
21 didn't they?
22 A That's what I've heard. I haven't done
23 studies in that regard myself.
24 Q You know that the cigarette was test
25 marketed in a number of locations around the

ROGGLI-CROSS

1408

1 country?
2 A That's what I've heard.
3 Q And you know that smokers didn't like the
4 taste or the smell of the cigarette or the
5 way that the cigarette lit?
6 A That's what's I've heard.
7 Q It was sort of like New Coke, it died a
8 death in the hands of the consumers, didn't
9 it?
10 A That's my understanding.
11 Q By the way, the development of the Premiere
12 cigarette was a very expensive undertaking,
13 wasn't it?
14 A Yes, I understood that it cost many hundreds
15 of millions of dollars.
16 Q You understand that that effort cost
17 hundreds of millions of dollars?
18 A Yes.
19 Q Has any foreign government or public health
20 organization ever undertaken an effort of
21 similar magnitude in an effort to develop a
22 cigarette that produces fewer number of
23 these chemicals that you believe could be
24 carcinogenic?
25 A I don't know.

ROGGLI-CROSS

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1 Q Dr. Roggli, on Wednesday morning you
2 outlined for Mr. Motley a number of lines of
3 evidence that you were relying on for your
4 opinion that smoking had been shown to cause
5 lung cancer and that exposure to
6 environmental tobacco smoke causes lung
7 cancer in nonsmokers.
8 A Yes, sir.
9 Q And one of those lines of evidence were what
10 you described as animal inhalation studies.
11 A Yes.
12 Q In fact, you testified yesterday that the
13 animal inhalation studies are very important
14 because they have the advantage over the
15 epidemiology studies of being able to
16 control for factors other than the one being
17 studied.
18 A Yes, sir.
19 Q In response to a question from Mr. Motley
20 you identified two inhalation studies of
21 environmental tobacco smoke. Do you recall
22 that?
23 A Yes.
24 Q One of them was the Essenberg 1952 study.

25 A Yes, sir.

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1 Q Study that was published about 34 years ago.
2 Excuse me. A study that was published 34
3 years before release of the 1986 Surgeon
4 General's Report?

5 A Yes.

6 MR. FURR: Mr. Cassell, do we have
7 the Surgeon General's Report in evidence?
8 Maybe it's back here on Mr. Motley's table.
9 I'm not sure.

10 Q Dr. Roggli, let me hand you what's been
11 marked as Plaintiffs' Exhibit 50168. That's
12 the 1986 Surgeon General's Report, isn't it,
13 sir?

14 A Yes, sir, it is.

15 Q Let me ask you to turn to page 247 of that
16 report.

17 A Okay.

18 Q By the way, the '86 report is a report
19 that's devoted to reviewing the scientific
20 literature that was available then on
21 environmental tobacco smoke and health;
22 right?

23 A Yes.

24 Q Beginning on page 245 there is a section in
25 that report called "Inhalation Experiments."

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1 Do you see that?

2 A There's a section titled "Experimental
3 Models." Is that what you're referring to
4 on page 245?

5 Q No. It says "Inhalation Experiments,"
6 doesn't it?

7 A Not on page 245.

8 MR. FURR: May I approach, Your
9 Honor?

10 THE COURT: Sure.

11 MR. FURR: Let me take a look at
12 this. I'm sorry.

13 Q 247. Sorry, Dr. Roggli. I misspoke.
14 Beginning on page 247 there's a section
15 titled "Inhalation Experiments"; is that
16 right?

17 A Yes.

18 Q And in that section the Surgeon General was
19 reviewing animal inhalation experiments of
20 cigarette smoke?

21 A Yes.

22 Q Would you take a look at page 249 and read
23 to the jury the last paragraph in that
24 section.

25 A It says, "Inhalation studies with sidestream

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1 or environmental tobacco smoke have not been
2 reported thus far with any of the laboratory
3 animal inhalational assays. This lack of
4 experiments has in large part been due to
5 the absence of exposure devices that allow
6 the appropriate delivery of the inhalant

7 without incurring the loss of the test
8 animals due to the toxicity of carbon
9 monoxide in nicotine."
10 Q The Essenberg 1952 study would have been
11 available to the Surgeon General, wouldn't
12 it?
13 A I would think so.
14 Q So at least the Surgeon General doesn't
15 agree with you that the Essenberg 1952 study
16 was a positive inhalation study for ETS?
17 A It would depend on whether or not they
18 reviewed the Essenberg study, and I'm not
19 sure -- that would depend on whether or not
20 it's quoted in their references; if it's not
21 quoted in their references, it was
22 overlooked. If it was quoted, then yes,
23 they would disagree with my interpretation.
24 And I don't see it in their alphabetical
25 listing of references. Essenberg is not in

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1 here, so they must have overlooked the
2 study.
3 Q Let's turn to the Witschi study. Before we
4 talk about the study specifically, I want to
5 back up and talk about the principle of
6 toxicology, and that is the concept of dose
7 response, okay?
8 A Sure.
9 Q It's a very important toxicological
10 principle, isn't it?
11 A Yes, sir.
12 Q Now, the basic principle is that if a
13 substance is causing an effect, you expect
14 to see an increased response as the dose
15 goes up, don't you?
16 A Yes.
17 Q And conversely you would expect to see a
18 decreased response as the dose goes down;
19 right?
20 A Yes, sir.
21 Q And I believe you stated yesterday that for
22 most substances, there is a threshold below
23 which you would not be able to observe an
24 increase in risk even though some
25 theoretical risk remains.

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1 A I don't know if that's a fair
2 characterization of what we talked about.
3 We talked about thresholds and we talked
4 about that there may be some practical
5 thresholds, but that for primary
6 carcinogens, there's usually no demonstrable
7 threshold, and it's a linear dose response
8 relationship.
9 Q This principle of dose response,
10 toxicologists sometimes describe this
11 principle by saying the dose makes the
12 poison, don't they?
13 A Yes.
14 Q Would you explain to the jury what that
15 phrase, "the dose makes the poison," means?

16 A As we discussed yesterday about, or the day
17 before, about arsenic levels, that all of us
18 are exposed to low levels of arsenic and
19 don't necessarily have any toxic effects to
20 it. So that means that at that real low
21 level of exposure that arsenic is not a
22 poison. Or at least it's not -- still the
23 same substance, it's still a poison, but it
24 doesn't have a biological effect at those
25 low levels.

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1 Q With that background, let's turn and talk
2 about the Witschi study which I believe was
3 Plaintiffs' 92969, Mr. Cassell.
4 Dr. Roggli, let me hand you a document
5 and see if you can determine whether or not
6 this is the same Witschi study that was
7 marked as Plaintiff's Exhibit 92969.
8 A Yes, sir, I believe it is.
9 Q Okay. Now, the Witschi study compared the
10 incidence of tumors in smoke-exposed animals
11 to that in unexposed animals; is that right?
12 A That's correct.
13 Q Would you tell the jury what the exposure
14 concentration was that was used in the
15 Witschi study.
16 A Well, it depends on what particular part of
17 the smoke you wanted to measure. But if you
18 want to measure it in terms of total
19 suspended particulate levels, it was 87
20 million grams per meter cubed.
21 Q 87 milligrams per meter cubed?
22 A Yes.
23 Q How many micrograms per meter cubed would
24 that be?
25 A Well, there's another way of looking at it

ROGGLI-CROSS

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1 in terms of micrograms per liter. If you
2 wanted to look at it in terms of micrograms
3 per liter cubed, it would be 87,000
4 micrograms per microliter cubed which is 87
5 micrograms per liter.
6 Q 87,000 micrograms per cubic meter was the
7 exposure that Witschi used if you use total
8 suspended particulate matter to describe it;
9 is that right?
10 A Yes.
11 Q Dr. Roggli, isn't it true that in workplaces
12 where smoking is permitted in the real
13 world, that the average total suspended
14 particulate matter concentration from
15 environmental tobacco smoke very seldom is
16 greater than 100 micrograms per cubic meter?
17 A Which would be one-tenth of a milligram per
18 meter cubed, you're saying.
19 Q First I'm asking you, isn't that true, that
20 that's what the average concentration is?
21 A I think that the -- well, in terms of what
22 this article says, it says that this level
23 is about 87 times higher than you would
24 expect from environmental tobacco smoke. So

25 they are saying that you could get certainly
ROGGLI-CROSS

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1 up to -- they're implying, certainly, you
2 can get up to a milligram per meter cubed in
3 environments where environmental tobacco
4 smoke is present.

5 Q That article says that this exposure is 87
6 times higher than the exposure that you
7 could get in extreme exposure situations, in
8 smokey bars, doesn't it?

9 A Yes.

10 Q And Mrs. Wiley didn't work in a smokey bar,
11 did she?

12 A Not that I'm aware of.

13 Q My question is what's the average TSP
14 concentration from environmental tobacco
15 smoke that you would see in workplaces
16 similar to the one that Mrs. Wiley worked
17 in?

18 A I think that depends on how you measure.
19 Are you talking about measuring it with her
20 standing over a veteran who is smoking at
21 that point or are you talking about
22 measuring it in her office when she had
23 doors closed? That's going to be a
24 tremendous variation.

25 Q There are a number of ways to measure it?

ROGGLI-CROSS

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1 A Sure.

2 Q What's the best way to measure it,
3 Dr. Roggli?

4 A There is no best way to measure it. Any way
5 that you try to measure it is going to have
6 certain assumptions, is going to have
7 certain limitation to it.

8 Q Dr. Roggli, isn't there a consensus among
9 measurement scientists that the best way to
10 assess an individual's exposure is to have
11 them wear a personal monitor in their
12 breathing zone?

13 A That is true, but what are you going to
14 monitor? Are you going to monitor total
15 suspended particulates? Are you going to
16 monitor nicotine?

17 Q That's what's we're talking about here.

18 A Are you going to monitor 4-aminobiphenyl.

19 Q That's a fair point.

20 A There's lots of ways to do it.

21 Q My question was too broad. What I should
22 have asked you is what's the best technology
23 to use, the best experiment design to use to
24 measure someone's exposure, and in that case
25 you would agree it's to wear a personal

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1 monitor in your breathing zone.

2 A If you want to know most accurately what an
3 individual was exposed to, if that's your
4 intent, then personal monitoring is the best
5 way to do it.

6 Q Now, there have been a number of studies

7 conducted in which exposure scientists have
8 conducted large scale studies where they had
9 to study subjects with personal monitors in
10 their breathing zone in an effort to assess
11 their ETS exposure, aren't there?

12 A It's my understanding that there are such
13 studies that have been performed.

14 Q And those studies show that, on average, an
15 individual that works in a typical
16 environment, that is -- I should say an
17 individual that works in an environment
18 outside of a smokey bar is exposed to an
19 average concentration of less than 100
20 micrograms per cubic meter, don't they?

21 A Well, that may be true but only problem I
22 have with your question is what is a typical
23 environment. Can you even define a typical
24 work environment in that regard?

25 Q Let me ask you this: Have there been

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1 studies conducted that collected data that
2 measured the average ETS concentration in
3 hospitals?

4 A Collected on nurses in VA Hospitals, I'm not
5 aware of such data, no, sir.

6 Q Dr. Roggli, assume for this question that,
7 in fact, the average concentration in a
8 typical smoking environment is less than 100
9 micrograms per cubic meter and for purposes
10 of comparison, if you'll permit me, I'll say
11 it's 87 micrograms per cubic meter, okay?

12 A Okay.

13 Q Now, if this, in fact, is correct, the
14 exposures that were used in the Witschi
15 study weren't 87 times this concentration,
16 they were 1,000 times this concentration,
17 weren't they?

18 A Based on those assumptions, that would be
19 correct.

20 Q Okay. Dr. Roggli, ETS, environmental
21 tobacco smoke exposure has never been shown
22 to produce pancreatic cancer in nonsmokers,
23 has it?

24 A Well, certainly there's been a lot of
25 concern about environmental tobacco smoke

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1 and pancreatic cancer, and for sure
2 pancreatic cancer has been strongly
3 associated with direct cigarette smoking.

4 Q That's not my question, Dr. Roggli. My
5 question is: Has environmental tobacco
6 smoke exposure ever been shown to cause
7 pancreatic cancer in nonsmokers?

8 A I don't think that epidemiologic studies
9 have yet been designed and conducted to
10 answer that question.

11 Q In fact, there's not a similar epidemiology
12 study that reports an increase in pancreatic
13 cancer among nonsmokers exposed to
14 environmental tobacco smoke, is there?

15 A I'm not sure if any epidemiologic study has

25 levels that the most sensitive analytical
ROGGLI-CROSS
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1 technology available can't measure it.
2 A Correct.
3 Q Dr. Roggli, you testified late yesterday
4 afternoon that individual susceptibility is
5 as important as dose response in whether or
6 not a given individual will develop disease
7 from a given exposure.
8 A I think it's definitely an important factor.
9 I don't know if it's possible to weigh which
10 one is heavier, but I think that it's
11 probably as important as dose in individual
12 susceptibility, particularly when you're
13 talking about low dose, but it also applies
14 to higher dose as well.
15 Q In other words, an individual's
16 susceptibility to exposure is half of the
17 equation, with dose response being the other
18 half.
19 A Yes.
20 Q Different people -- and what underlies your
21 thought on that, I believe, is that
22 different people have different
23 susceptibility to different chemicals;
24 right?
25 A Well, what is underlying my thought on that

ROGGLI-CROSS
1425
1 actually is genetic differences,
2 polymorphisms in the population that are
3 related to genes that have to do directly
4 either with the cell cycle or with
5 metabolism of carcinogens.
6 Q Would you tell the jury what you know about
7 Mrs. Wiley's individual susceptibility to
8 developing lung cancer from radon?
9 A I don't know of any direct information
10 that's available on that because no specific
11 genes were measured in Mrs. Wiley in that
12 regard.
13 Q Would you tell the jury what you know about
14 Mrs. Wiley's individual susceptibility to
15 developing lung cancer from air pollution?
16 A I don't think there is any measurement that
17 was done in this case in that regard.
18 Q You and Mr. Ohlemeyer talked yesterday about
19 the U. S. Environmental Protection Agency
20 report a little bit, and you talked about
21 the relative risk of 1.19 that the U. S.
22 Environmental Protection Agency reported for
23 any exposure to spousal smoking. Do you
24 recall that?
25 A That was the average value projected for the

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1 whole range of exposures from mild to
2 moderate to heavy, yes, sir.
3 Q It wasn't projected, was it? It was
4 calculated by using a statistical technique
5 known as meta-analysis, wasn't it?
6 A Yes, sir.

7 Q And would you explain to the jury what
8 meta-analysis is.
9 A Well, meta-analysis is a technique which is
10 used by epidemiologists when, for a
11 particular disease that happens to be very
12 uncommon so that for any one epidemiologic
13 study it's impossible to get large enough
14 numbers of patients to get a statistically
15 valid result, and what one can then do with
16 the meta-analysis is look at the number of
17 studies and compare them and determine if
18 the directions of the studies are similar,
19 that is, point in the same direction of an
20 association or not, and then make an
21 estimate of what the overall risk is from
22 pooling the results of all the studies that
23 are available.
24 Q In fact, Dr. Roggli, when the EPA conducted
25 their meta-analysis, they combined the data

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1 from all the spousal smoking studies that
2 met their criteria for inclusion in this
3 analysis and combined all the data so they
4 could calculate a relative risk as though
5 they were doing one big study; is that
6 right?
7 A Yes. Well, that's my understanding of the
8 way met analyses are done. There may be
9 some more sophisticated assumptions in it
10 than that that I'm not aware of.
11 Q That's the basics of it?
12 A Yes.
13 Q That same type of meta-analysis can be
14 performed on the data, the epidemiologic
15 data that have been collected in studies of
16 occupational exposure to environmental
17 tobacco smoke and lung cancer risk, can't
18 it?
19 A I suppose that that can be done. There are
20 fewer studies available with occupational
21 exposure than with spousal exposures, but
22 one could attempt to do the same sort of
23 analysis.
24 Q Now, in fact, that's one of the reasons we
25 do meta-analyses, isn't it, to take smaller

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1 studies or data or studies that had smaller
2 amounts of data, and combine it so that one
3 can acquire more statistical power to give
4 additional statistical validity to the
5 estimate?
6 A Sure.
7 Q Now, when you go through that process and
8 you combine all of the occupational
9 epidemiologic data for environmental tobacco
10 smoke exposure and lung cancer risk, isn't
11 it true that you produce a relative risk of
12 1.01?
13 A I'm not aware of that. I haven't seen that
14 study or am aware of such an analysis
15 myself.

16 Q You've never done such an analysis, I take
17 it.
18 A Meta-analysis is something that would be
19 done by experienced epidemiologists who have
20 had experience in that area and I have not
21 had experience with meta-analysis and would
22 not attempt to do such a study myself.
23 Q You realize that a number of meta-analyses
24 of the occupational exposure data of lung
25 cancer risk for environmental tobacco smoke

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1 have been published in the peer reviewed
2 literature, don't you?
3 A If they are, I don't think I've seen those
4 studies. At least I'm not specifically
5 aware of them.
6 Q It's obviously something you haven't
7 researched, I take it.
8 A That's correct.
9 Q Dr. Roggli, assume for the next question
10 that my representation is correct, that that
11 meta-analysis produces a relative risk of
12 1.01, okay?
13 A Yes.
14 Q Wouldn't you agree, Dr. Roggli -- and I
15 understand you're not an epidemiologist, but
16 you have offered some opinions here about
17 epidemiology. Wouldn't you agree that this
18 number is absolutely indistinguishable on an
19 epidemiologic basis from 1.0?
20 A For practical purposes, that would be true.
21 Q And 1.0 means no increased risk in an
22 epidemiology study.
23 A That's my understanding.
24 Q Dr. Roggli, when you began your testimony
25 with Mr. Motley Wednesday morning, you

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1 identified some public health organizations
2 and agencies that you said had reached the
3 conclusion that environmental tobacco smoke
4 is a cause of lung cancer. Do you recall
5 that?
6 A Yes, sir.
7 Q Now, isn't it true, Dr. Roggli, that there
8 are eminent and very well-respected
9 scientists and medical doctors that have
10 published in the peer reviewed literature in
11 the past three to four years since the
12 publication of the EPA report, that the data
13 don't yet justify the conclusion that
14 environmental tobacco smoke is a cause of
15 lung cancer?
16 A Such as?
17 Q Start with Ernst Wynder, Detrick Hoffman,
18 Geoffrey Kabat.
19 A My understanding is that Dr. Wynder was
20 actually working with and had been
21 associated with and consulted with tobacco
22 companies in that regard, so I'm not sure
23 whether that may have influenced his opinion
24 in that, how that might have influenced his

25 opinion in that regard.

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1 Q Let me make sure I understand this,
2 Dr. Roggli. Is it your position that
3 Dr. Wynder is in cahoots with the tobacco
4 industry?
5 A I didn't say that. I think Dr. Wynder has
6 done a lot of tremendous work with regard to
7 the epidemiology of tobacco smoke and the
8 way tobacco smoke causes lung cancers and
9 he's had a tremendous contribution in this
10 regard. But his interpretation of the
11 epidemiologic data is conservative compared
12 to that of many government agencies who have
13 had this question reviewed by imminent
14 scientists and imminent panels of
15 scientists, and his conservative viewpoint
16 on that, I have to wonder, could that have
17 been influenced by the fact that he has
18 consulted with tobacco companies.
19 Q Dr. Wynder is one of the ten most renowned
20 smoking health epidemiologists in the world,
21 isn't he, Doctor?
22 A Yes, sir, I agree with that.
23 Q You believe that his views on ETS are
24 somehow colored by your impression that
25 Dr. Wynder has some alliance with the

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1 tobacco industry?
2 A I didn't say he had an alliance. I said
3 he's consulted with the tobacco industry,
4 and I said his viewpoints on ETS and lung
5 cancer are conservative.
6 Q What about Dr. Detrick Hoffman, do you know
7 who he is?
8 A Yes.
9 Q Who is Dr. Detrick Hoffman?
10 A Dr. Hoffman is a Ph.D. who has done
11 tremendous amount of studies based on the
12 chemical composition of cigarette smoke and
13 on the mechanisms and the way that
14 cigarettes work and has written articles
15 about how cigarettes can be improved.
16 Q He's a very well-known scientist in the
17 field of smoking and health, isn't he?
18 A Yes, he is.
19 Q World renowned?
20 A Yes, sir.
21 Q Hasn't he also joined in the publication in
22 peer reviewed literature of articles in
23 which the causal relationship between
24 environmental tobacco smoke and lung cancer
25 has been questioned in the past few years?

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1 A Well, if he's done that, my -- I think the
2 likelihood is he has done that as a
3 co-author to Dr. Wynder.
4 Q That's right.
5 A And Dr. Wynder would be the epidemiologist
6 upon whose opinion he would be relying in

7 that regard, since Dr. Hoffman is not an
8 epidemiologist. So I think if his name is
9 on that, you're really talking about, again,
10 Dr. Wynder's opinion.
11 Q Okay. Let's talk about what happens when
12 Dr. Wynder publishes with another
13 epidemiologist. Who is Dr. Geoffrey Kabat?
14 A Only thing I know about Dr. Kabat is that he
15 is a co-author of articles with Dr. Wynder.
16 I don't know any more about him.
17 Q Don't you know that Dr. Geoffrey Kabat is
18 one of the epidemiologists in this country
19 that the U. S. Environmental Protection
20 Agency turned to and asked to serve sort of
21 as a peer reviewer of its risk assessment of
22 environmental tobacco smoke and health?
23 A That wouldn't surprise me because I think
24 the U. S. Environmental Protection Agency
25 sends their opinions and review on that to a

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1 number of doctors to look at and give their
2 feedback and opinion.
3 Q That's not the role that Dr. Kabat played?
4 A I don't know what role Dr. Kabat played.
5 Q Do you know that the U. S. Environmental
6 Protection Agency convened a scientific
7 advisory board panel to serve as its
8 reviewer for environmental tobacco smoke
9 risk assessment, don't you?
10 A Yes, sir.
11 Q You know that Dr. Geoffrey Kabat was one of
12 the outside epidemiologists that the U. S.
13 Environmental Protection Agency turned to to
14 ask to serve on that panel.
15 A I don't know.
16 Q That's not something you know?
17 A That's correct.

18 MR. FURR: Could I have the U. S.
19 Environmental Protection Agency report in
20 evidence, please, sir.

21 We may have some confusion here, Your
22 Honor. I understood Mr. Motley to move into
23 evidence the EPA report and for it to be
24 admitted into evidence, but he may have
25 mistakenly submitted a different report when

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1435

1 he actually did that.
2 THE COURT: What was the number of
3 the document?
4 MR. MOTLEY: May I look over here,
5 Judge?
6 THE COURT: Sure.
7 MR. MOTLEY: If I gave the wrong
8 book, Your Honor, and this looks like the
9 right book, but if I did, I will substitute
10 it.
11 THE COURT: Good time to take a
12 break anyway. We'll clear this up.
13 (Standard admonition)
14 (A brief recess was taken.)
15 MR. CASSELL: All rise.

16 THE COURT: Be seated. Jury back
17 in its entirety, together with the
18 alternates.
19 Cross-examination. State your name
20 again.

21 THE WITNESS: Victor Louis Roggli.

22 THE COURT: All right. Mr. Furr,
23 are we clear on the exhibits?

24 MR. FURR: Yes, Your Honor, we are.

25 THE COURT: Continue, Counselor.

ROGGLI-CROSS

1436

1 MR. FURR: Thank you, Your Honor.

2 BY MR. FURR:

3 Q Almost finished, Dr. Roggli.

4 Let me hand you what's been entered
5 into evidence as Plaintiffs' Exhibit 50234
6 which is a reprint by the National
7 Institutes of Health of the U. S.
8 Environmental Protection Agency's Report on
9 Environmental Tobacco Smoke and ask you
10 first to take a look at page Roman numeral
11 XIII.

12 A Okay.

13 Q On page Roman numeral XIII there's a section
14 there that indicates that the report was
15 submitted for review to a subcommittee, they
16 call it the IAQTHEC, Indoor Air Quality
17 Total Human Exposure Committee, by the EPA
18 for review of two of the drafts in the
19 report. Do you see that?

20 A Yes.

21 Q And on page 14 they show you who the
22 consultants to that committee were that
23 reviewed the report for the EPA, don't they?

24 A Yes, sir.

25 Q And they list Dr. Kabat as an epidemiologist

ROGGLI-CROSS

1437

1 who reviewed the report, don't they?

2 A Yes, sir, they list Dr. Geoffrey Kabat, Sr.,
3 Epidemiologist, American Health Foundation.

4 Q And he is just one of two or three
5 epidemiologists that the EPA turned to have
6 the report reviewed, isn't he?

7 A Yes.

8 Q We know who Dr. Kabat is now.

9 Let's go back to Dr. Winder for a
10 moment. I forgot to ask you a question or
11 two. Is Dr. Winder the scientist who
12 reported one of the first epidemiology
13 studies in 1950 that uncovered a statistical
14 relationship between tobacco smoke and lung
15 cancer disease?

16 A Yes, he is.

17 Q Isn't he also the same researcher that in
18 1953 reported the mouse skin painting study
19 that created a tremendous level of interest
20 in the relationship between smoking and lung
21 cancer?

22 A Yes, sir, he is.

23 Q Now, if Dr. Winder was willing to consult
24 with the tobacco industry, you would approve

25 of the tobacco industry turning to
ROGGLI-CROSS

1438

1 Dr. Winder for advice on smoking and health,
2 wouldn't you?
3 A I would think if they consulted with an
4 individual who had been a pioneer in the
5 area, that that would be a wise thing to do.
6 Q Certainly nothing wrong with that, is there?
7 A I wouldn't criticize them for that.
8 Q Okay. Now let's look at what is written
9 when two epidemiologists get together, that
10 being Dr. Kabat and Dr. Winder, so that we
11 don't have the problem of Dr. Winder's
12 opinions overriding Dr. Kabat's opinion,
13 since they're both senior epidemiologists.
14 Okay?
15 A Okay.
16 Q Let me hand you what we've marked as
17 Defendants' Exhibit R501 for identification.
18 A Okay.
19 Q That's a scientific article titled "Relation
20 Between Exposure to Environmental Tobacco
21 Smoke in Lung Cancer in Lifetime
22 Nonsmokers," isn't it?
23 A Yes, sir, it is.
24 Q That's published in the American Journal of
25 Epidemiology, isn't it?

ROGGLI-CROSS

1439

1 A Correct.
2 Q And that's the official journal of the major
3 society of epidemiologists in this country?
4 A That's my understanding.
5 Q It's obviously a very authoritative peer
6 reviewed journal in your opinion, isn't it?
7 A Well, I'm not an epidemiologist, so I don't
8 read this journal routinely, and I'm not
9 sure of what is the main journal
10 epidemiologists read. But I have no reason
11 to think that this is not a topnotch journal
12 in that area.
13 Q In fact, the journal is published by the
14 Johns Hopkins School of Hygiene Public
15 Health in Baltimore, isn't it?
16 A Yes, sir.
17 Q That's one of the better schools of public
18 health in the world, isn't it?
19 A That's my understanding, yes, sir.
20 Q Let's take a look at who sponsored this
21 study. If you would turn to the
22 acknowledgements on the next to last page.
23 A Okay.
24 Q Study was sponsored by the National Cancer
25 Institute, wasn't it?

ROGGLI-CROSS

1440

1 A Sponsored by the National Cancer Institute
2 and contributed to by a number of
3 institutions and individuals.
4 Q What is the National Cancer Institute?
5 A That is one of the National Institutes of
6 Health that was established by the federal

7 government, and that particular one is the
8 National Institute of Health which
9 concentrates on research related to the
10 disease cancer.
11 Q Okay, Dr. Roggli. Would you read to the
12 jury the last sentence that appears in the
13 abstract of this paper where epidemiologists
14 Kabat and Wynder summarize the results of
15 their study.
16 A On the last page?
17 Q No, sir. The last sentence of the abstract.
18 A Last sentence of the abstract says, "While
19 this study had limited sample size, the
20 pattern of odds ratios shows little
21 indication of an association of
22 environmental tobacco smoke with lung cancer
23 in nonsmokers."
24 Q And this was published in 1995; is that
25 correct?

ROGGLI-CROSS

1441

1 A Yes, sir.
2 Q To your knowledge, the tobacco industry
3 didn't have any role in the production of
4 this paper, the interpretation of the data
5 by Dr. Wynder and Kabat, did it?
6 A They're certainly not mentioned in the
7 acknowledgements that I can see. And --
8 let's see. I don't see any disclosure of
9 conflict of interest, so I don't have any
10 evidence that that would be the fact.
11 Q You would expect Dr. Kabat and Wynder to
12 indicate in the disclosure acknowledgements
13 any participation by the tobacco industry,
14 wouldn't you?
15 A I certainly hope so.
16 MR. FURR: Thank you. That's all
17 the questions I have.
18 THE COURT: Any other
19 cross-examination, Counsel?
20 All right, Mr. Motley, any redirect?
21 MR. MOTLEY: Yes, Your Honor.
22 Thank you.
23 Good morning, ladies and gentlemen.

24 REDIRECT EXAMINATION

25 BY MR. MOTLEY:

ROGGLI-REDIRECT

1442

1 Q Doctor, would you like some water?
2 A No. I'm fine, thank you.
3 Q A lot of things were covered, and I'm
4 obviously not going to cover everything.
5 I'll try to be as brief as possible.
6 You stated your opinions to this jury
7 yesterday that you believed that the
8 cancer -- and I'm not going to summarize
9 everything you said. I'll focus on one or
10 two things.
11 You told us yesterday --
12 Can you see what I've written up here?
13 I'm afraid to move it.
14 A I could until you moved it.
15 Q Well, it says Mrs. Wiley died of primary

16 lung cancer. That's what you told the jury
17 yesterday; isn't that correct?
18 A Yes, sir.
19 Q And you've been through about six hours of
20 cross-examination. What is your opinion,
21 sitting here today, did Mrs. Wiley die of
22 primary lung cancer?
23 A Yes, sir, she did.
24 Q Now, you have used the term "reasonable
25 degree" and I'm going to abbreviate it, to a

ROGGLI-REDIRECT

1443

1 reasonable degree of medical certainty. And
2 you understand in a court of law you can't
3 guess or speculate; correct?
4 A That's my understanding, yes, sir.
5 Q So to a reasonable degree of medical
6 certainty means more probably true than not.
7 A Yes, sir.
8 Q But in this case, in this issue right here,
9 how certain are you, based on all the
10 evidence, sir, that you told the jury about,
11 which I won't repeat, how certain are you
12 that Mrs. Wiley died of primary lung cancer?
13 Is it just to a reasonable degree of medical
14 certainty, or is it greater than that?
15 A Greater than that, yes, sir.
16 Q Well, I mean, to give the jury some
17 estimation, I know these things aren't exact
18 of how certain you are. Obviously, very few
19 things in life are 100 percent certain. But
20 how certain are you that that is a primary
21 lung cancer?
22 A Well, let me preface that by saying that, at
23 least in my opinion, there is nothing 100
24 percent in medicine or in pathology. It
25 involves a lot of training, it involves a

ROGGLI-REDIRECT

1444

1 lot of judgment in putting together all the
2 information that one has.
3 And my understanding of reasonable
4 medical certainty would be that it's at
5 least 51 percent likely, more likely than
6 not is to a reasonable degree of medical
7 certainty. My understanding of the term.
8 And in this case I would say that the
9 certainty that this is lung cancer would be
10 95 percent.
11 Q And nothing they asked you or showed you has
12 shaken your opinion.
13 A Oh, no, sir.
14 Q You testified yesterday that you share the
15 opinions of the United States Surgeon
16 General, the EPA, the American Cancer
17 Society, the World Health Organization --
18 and I'm not going to list everybody -- all
19 of these organizations that have looked at
20 this evidence that you were asked about, and
21 is it still your opinion that secondhand
22 smoke is a cause of lung cancer in
23 nonsmokers?
24 A Yes, sir.

25 Q Is it still your opinion based on all the
ROGGLI-REDIRECT
1445
1 evidence that you've seen, not can this do
2 that, can this do that, is it possible this
3 or possible that, but is it still your
4 opinion based on a reasonable degree of
5 medical certainty that Mrs. Wiley's exposure
6 at hospitals as a nurse was a contributing
7 cause of her lung cancer?
8 A Yes, sir.
9 Q Exposure to cigarette smoke?
10 A Yes, sir.
11 Q Okay. Now, you were asked a question about
12 smokey bars. Do you remember that?
13 A Yes, sir.
14 Q And when you hear the term "smokey bars,"
15 what comes to your mind?
16 A Well, I think about the Long Branch in
17 Raleigh, North Carolina, which I avoid as
18 much as possible where when you walk into a
19 place such as that, you can see the smoke
20 hanging in the air.
21 Q A haze in the air?
22 A Yes, sir.
23 Q And that would be fairly heavy exposure?
24 A I would say so.
25 Q When three or four people are sitting around
ROGGLI-REDIRECT

1446
1 in a small room smoking, would that be
2 pretty heavy exposure?
3 A It can be if they're all smoking
4 simultaneously, yes, sir.
5 Q Now, when you were at the VA Hospital in
6 Houston, when you were actually out on the
7 ward, did you see any patients or nurses
8 walking around with these -- describe that
9 monitor business again that you were asked
10 about, to find out about exposure.
11 A Well, there's all sorts of personal monitors
12 that have been developed for a number of
13 purposes.
14 For example, radiologists typically
15 have a radiation badge that measures how
16 much radiation that you're exposed to in the
17 workplace. You can do that with a number of
18 different agents if you have the proper
19 technology to detect it.
20 And there are monitors for respirable
21 suspended particulates or total suspended
22 particulates. So one could wear such a
23 monitor badge around to do that.
24 Q Well, when you were out on the ward in the
25 hospitals from '74 to 1980, and now from
ROGGLI-REDIRECT

1447
1 time to time you do go out on the halls of
2 the hospital, don't you?
3 A Yes, sir.
4 Q At Duke?
5 A Yes.
6 Q Have you seen a box anywhere of Philip

7 Morris special monitors for nurses to wear
8 to see whether or not they're getting too
9 much smoke?
10 MR. OHLEMEYER: Your Honor, I
11 object to that as argumentative.
12 MR. MOTLEY: I don't think so, Your
13 Honor.
14 MR. OHLEMEYER: It's redirect
15 examination. It's leading and
16 argumentative.
17 THE COURT: He can answer. The
18 objection is overruled.
19 Q Have you seen any Philip Morris paid-for
20 monitors for people to see how much
21 secondhand smoke they're exposed to?
22 A No, sir, I have not.
23 MR. MOTLEY: Your Honor, I move the
24 admission -- first let me ask this question:
25 Q You were asked questions by Mr. Furr about
ROGLI-REDIRECT

1448

1 safer cigarettes. Do you recall that?
2 A Yes.
3 Q Premiere?
4 A Yes.
5 Q Do you remember he asked you about that?
6 A Yes, I do.
7 MR. MOTLEY: Your Honor, on the
8 issue of safer cigarettes, I move the
9 admission at this time of Plaintiffs'
10 Exhibit 1378.
11 MR. OHLEMEYER: I object, Your
12 Honor. May I be heard?
13 THE COURT: Sure.
14 (Bench discussion.)
15 THE COURT: All right. There is an
16 objection to Plaintiffs' Exhibit 1378. The
17 objection is noted and overruled.
18 Plaintiffs' 1378 will be admitted.
19 (Plaintiffs' Exhibit(s) 1378 received
20 in evidence.)
21 THE COURT: Go ahead, Mr. Motley.
22 BY MR. MOTLEY:
23 Q Doctor, you were asked about a safer
24 cigarette.
25 A Yes, sir.
ROGLI-REDIRECT

1449

1 Q And this is a Philip Morris document, ladies
2 and gentlemen, dated October 1978. I ask
3 you to assume that the author of this -- or
4 maybe you know this. Did you know that Dr.
5 Wakeham was the head of research and
6 development of Philip Morris?
7 A Yes, sir, that's my understanding.
8 Q That he wrote this document, "Presentation
9 to the Board of Directors of Philip Morris."
10 Do you know what the Board of Directors of a
11 corporation is?
12 MR. OHLEMEYER: I object to
13 Mr. Motley's testimony.
14 THE COURT: Sustained.
15 MR. MOTLEY: It says, "Presentation

16 to the Philip Morris Board."
17 THE COURT: Ask the witness.
18 Q Does it say "Presentation to the Philip
19 Morris Board"?
20 A Yes, sir, "Presentation to Philip Morris
21 Board," yes, sir, at the top of the page.
22 MR. MOTLEY: Now, will you show the
23 first thing. Up.
24 It's not a good copy, but can you folks
25 see that?

ROGGLI-REDIRECT

1450

1 Can you zoom in where I have the tag,
2 please.
3 Q Firstly, we would like --
4 MR. MOTLEY: Could you mark on
5 there for me, since that's not an exhibit,
6 so I know exactly where I wanted to focus.
7 MR. OHLEMEYER: If you're going to
8 read that, I'd like you to read the first
9 paragraph.
10 MR. MOTLEY: I'll read the first
11 paragraph. I'll be glad to publish the
12 whole document.
13 THE COURT: You can ask him a
14 question about a specific part.
15 MR. MOTLEY: Mr. Ohlemeyer asked me
16 to read something else.
17 THE COURT: Right.
18 Q Do you see at the bottom of the first page,
19 Mr. Waycum, the head of R & D at Philip
20 Morris, says, "The second trend is the
21 intensifying pressure to develop a safe
22 cigarette. The European Tobacco Industry
23 has agreed that smoking is harmful." Do you
24 see that?
25 A Yes, sir.

ROGGLI-REDIRECT

1451

1 Q "And is hard at work to develop a 'less
2 hazardous product.'"
3 MR. MOTLEY: Next page. Will you
4 mark where so I can see it where I have a
5 tag.
6 Q My question to you as to the first page,
7 sir, is what is your understanding of what a
8 scientifically -- what does a less hazardous
9 cigarette mean?
10 A Less hazardous means that it would be less
11 likely to cause disease than a more
12 hazardous cigarette.
13 Q All right. On page 2, can you see what
14 we've highlighted there?
15 A Yes.
16 Q Now I can't find it on mine. Okay. I've
17 got it. "The definition of cigarette
18 'safeness'" -- this is the second
19 paragraph -- "centers around a battery of
20 bioassay tests, currently with animals but
21 eventually with humans."
22 What are bioassay tests?
23 A Those are tests of activity in biological
24 systems of some sort of component. An

25 example would be the skin painting
ROGGLI-REDIRECT
1452
1 experiments that were performed by
2 Dr. Wynder in the 1950s.
3 Q "Centers around a battery of bioassay tests
4 currently with animals but eventually with
5 humans. Our current program is to use a
6 limited number of such tests to evaluate
7 filter combinations, blend components, and
8 even nontobacco substitute materials. We
9 are working to be in a position to design a
10 cigarette which will meet 'less hazardous'
11 specifications if they are ever imposed on
12 us, and at the same time to make a product
13 which is attractive to the smoker. I am
14 pleased to report that we already have a
15 number of such prototypes on our shelves,
16 with more to come in the future."
17 Now, Doctor, are you aware of whether
18 or not Philip Morris has introduced such a
19 cigarette as that in the commercial market
20 20 years after that was written?
21 A No, sir.
22 Q Next place, please. Page 3, Doctor. Down
23 at the bottom.
24 "By 1978 we expect to have about 500
25 employees working in our modern research

ROGGLI-REDIRECT
1453
1 center facilities at a cost of less than
2 half of 1 percent of sales. Our people are
3 conscious of the challenges to improve the
4 performance and polarity of the products we
5 sell. Research and development provides the
6 Philip Morris response system; your
7 insurance against surprises that may
8 undermine the preeminence of our business."
9 Dr. Roggli, do you know which cigarette
10 company enjoys the largest market share in
11 the United States?
12 A Yes, sir.
13 Q Which one is that?
14 A Philip Morris.
15 MR. MOTLEY: Your Honor, we'd move
16 to introduce -- is that 16721 -- Exhibit
17 16721, Your Honor.
18 (Bench discussion)
19 THE COURT: I'm going to take the
20 offer of Plaintiffs' Exhibit 16721 under
21 advisement pending further evidence,
22 Mr. Motley. You may proceed.
23 MR. MOTLEY: Thank you, Your Honor.
24 Q Dr. Roggli, you recall yesterday when we
25 discussed the journal of the medical

ROGGLI-REDIRECT
1454
1 association article?
2 A Yes.
3 Q In reference to Brown & Williamson
4 documents?
5 A Yes, sir.
6 Q And I believe you indicated you had studied

7 that article?
8 A Yes.
9 Q Do you recall the name of Dr. I. Wally
10 Hughes, H-U-G-H-E-S, whose name appears on
11 that document?
12 A Yes, I believe he was involved with research
13 and development in one of the tobacco
14 companies. I don't recall which one. It
15 may be Brown & Williamson. I'm not sure.
16 Q Now, Dr. Roggli, if the cigarette companies
17 had made safer cigarettes from 1976 on, what
18 would the effect have been of the amount of
19 carcinogens that Mrs. Wiley would have
20 breathed, had they sold and offered and
21 taken hazardous cigarettes off the market
22 and sold less hazardous cigarettes, what
23 would have been the effect, cumulative dose
24 of carcinogens Mrs. Wiley would have
25 received after 1976 had they done that,

ROGGLI-REDIRECT

1455

1 hypothetically?
2 MR. OHLEMEYER: Objection. Lack of
3 foundation.
4 THE COURT: Sustained.
5 Q What is the difference between a safe
6 cigarette and a dangerous one, as far as a
7 secondhand smoker, person who is exposed to
8 secondhand smoke?
9 MR. OHLEMEYER: Objection, lack of
10 foundation, calls for speculation, Your
11 Honor.
12 THE COURT: Overruled. You may
13 answer that question.
14 A Yes. My understanding is that one of the
15 factors that was measured regarding the
16 hazard of a cigarette was its biological
17 activity, for example, in skin painting
18 experiments and the biological activity
19 measured in those experiments had to do with
20 carcinogens that were present. So a less
21 hazardous cigarette in that context would be
22 one that had less carcinogens produced.
23 Q Doctor, without reading it to the jury,
24 would you read to yourself the first
25 sentence of the document which is 16721,

ROGGLI-REDIRECT

1456

1 which is in front of you.
2 A Yes, sir.
3 Q You have read it.
4 A Yes, sir.
5 Q Doctor, as a scientist --
6 MR. MOTLEY: Your Honor, I would
7 like to publish the document at this time.
8 THE COURT: Offering it, Counselor?
9 MR. MOTLEY: Yes, I am.
10 MR. OHLEMEYER: Same objections.
11 THE COURT: And you offer it as to
12 whom?
13 MR. MOTLEY: Brown & Williamson
14 only, Your Honor.
15 MR. OHLEMEYER: Same objections,

16 Your Honor.
17 THE COURT: The objection is noted
18 and overruled. This document 16721 will be
19 admitted only as it relates to Brown &
20 Williamson.

21 (Plaintiffs' Exhibit(s) 16721 received
22 in evidence.)

23 THE COURT: Go ahead, Counselor.

24 MR. MOTLEY: Your Honor, can we
25 give the jury -- we got extra copies of

ROGGLI-REDIRECT

1457

1 these, can we have Mr. Cassell give them to
2 the jury?

3 THE COURT: Don't you want to put
4 it up?

5 MR. MOTLEY: I want to do that,
6 too, but it's easier to put it up and see if
7 they can see it.

8 THE COURT: Yes, let's put it up
9 and see if they can see it.

10 MR. MOTLEY: Can you all read that?
11 Show the date and the name.

12 Q This is March 1976, Dr. I.W. Hughes. "Today
13 we have all the information necessary to
14 manufacture reduced hazard cigarettes. It
15 is possible to strip and extend tobacco to
16 the point that the resulting cigarette is
17 reduced to a minimum configuration:
18 Emitting essentially hot air."

19 Did I read that correctly, sir?

20 A Yes.

21 Q Sir, as a scientist, does that indicate to
22 you that Brown & Williamson, at least
23 Dr. Hughes, had the knowledge to produce a
24 less hazardous cigarette in 1976?

25 MR. OHLEMEYER: Your Honor, I

ROGGLI-REDIRECT

1458

1 object to that as calling for speculation.
2 He's asking Dr. Roggli to read somebody's
3 mind.

4 THE COURT: Overruled. You can
5 answer that.

6 A Well, it says "all the information necessary
7 to manufacture reduced hazard cigarettes"
8 and in the context of what we discussed
9 before of what that means, it would indicate
10 that Dr. Hughes believed that he had the
11 technology to do so at that time.

12 Q Thank you. I'm going to move to another
13 area, Doctor.

14 MR. MOTLEY: May I approach, Your
15 Honor?

16 THE COURT: Sure.

17 Q No wonder so few people go to medical
18 school. You all have to read books like
19 this all the time?

20 A Yes, sir.

21 Q What's that about? 3,000 pages long. Were
22 you asked about this book yesterday?

23 A Yes, sir, I was.

24 Q Will you refresh the jury and the Court, say

25 what the name of that is first.
 ROGGLI-REDIRECT 1459

1 A The name of the textbook is "Cancer:
 2 Principles and Practice of Oncology."
 3 Q Do you recall Mr. Ohlemeyer asked you about
 4 that book yesterday?
 5 A Yes, sir, I do.
 6 Q And I believe you told him that, is it
 7 Dr. DeVita?
 8 A Yes.
 9 Q Was a well-respected, renowned cancer
 10 doctor; is that correct?
 11 A Yes, sir.
 12 Q And that that textbook is widely used; is
 13 that correct?
 14 A Yes, sir.
 15 Q And he asked you about some of Dr. DeVita's
 16 opinions expressed in that book. Do you
 17 recall that?
 18 A Yes.
 19 Q I would like to do the same thing.
 20 On page 193 of this big book,
 21 Dr. DeVita says, "Tobacco smoking is a major
 22 cause of cancer in people." He used the
 23 word "cause". Did you hear that?
 24 A Yes.
 25 Q "And accounts for almost 96 percent of all
 ROGGLI-REDIRECT 1460

1 male lung cancers in Caucasians."
 2 Do you agree or disagree with that
 3 statement?
 4 A I think that's a reasonable estimate, yes,
 5 sir.
 6 Q On page 194, in regard to what Mr. Furr was
 7 asking you --
 8 MR. OHLEMEYER: Your Honor, I don't
 9 mean to interrupt. Can I have a continuing
 10 objection to the use of this treatise on
 11 redirect examination for the same reasons I
 12 objected to it on direct examination?
 13 THE COURT: I'll show that as
 14 continuing.
 15 MR. OHLEMEYER: Thanks.
 16 Q On page 194, Dr. DeVita, that they asked you
 17 about, "Tobacco-related DNA damage has been
 18 associated with increased sister chromatid
 19 exchanges, micronuclei formation -- oh, my
 20 goodness -- hypoxanthineguanine nicotine.
 21 Have you ever heard of such a thing?
 22 Does that word ring a bell?
 23 A Hypoxanthineguanine? I have to see the
 24 word.
 25 Q I want you to read it, because you can
 ROGGLI-REDIRECT 1461

1 pronounce it. Then I'll ask you if you
 2 agree with it.
 3 A "Tobacco smoke exposure, active and passive,
 4 leads to adduct formation detectable in the
 5 lung, uterine, cervix and larynx.
 6 Tobacco-related DNA has been associated with

7 increased sister chromatid exchanges,
8 micronuclei formation, hypoxanthineguanine
9 phosphoribosyl transferase mutations and G
10 to T transversions for the P53 tumor
11 suppressor gene in lung cancer."
12 Q Is that what you were testifying about
13 yesterday, the P53 gene?
14 A Yes, sir.
15 Q Do you agree with Dr. DeVita's conclusion
16 there?
17 A Yes, sir.
18 Q Is that what you were telling the jury?
19 A Yes, sir.
20 Q On page 197 Dr. DeVita concludes that, "For
21 example, G:C-T:A transversions, which
22 predictably result from polycyclic aromatic
23 hydrocarbon exposure, are seen commonly in
24 lung cancers, 40 percent."
25 Is that what you told the jury?

ROGGLI-REDIRECT

1462

1 A Yes, sir.
2 Q Do you agree with that?
3 A Yes, sir.
4 Q What is an example of a polycyclic aromatic
5 hydrocarbon found in cigarette smoke?
6 A There's a number of them. The most
7 celebrated and known for the longest period
8 of time is benzo(a)pyrene.
9 Q And that's what the animation depicted?
10 A Yes, sir.
11 Q Doctor, on page 240, Dr. DeVita concludes
12 that "Little is known about the causes of
13 pancreatic cancer. And tobacco smoking
14 represents the only established determinant
15 of the disease."
16 Do you agree that tobacco smoking is a
17 cause of pancreatic cancer?
18 A Yes, sir.
19 Q Dr. DeVita then goes on to say, "The link
20 with chronic pancreatitis is more tenuous,
21 and if it does exist, it's probably fairly
22 weak."
23 Do you agree with that?
24 A Yes, sir.
25 Q Is that what you told the jury?

ROGGLI-REDIRECT

1463

1 A Yes, sir.
2 Q On page 241, "Several investigators have
3 concluded that passive smoking --" that's
4 the same thing as secondhand smoke.
5 A Yes, sir, environmental tobacco smoke, same
6 thing.
7 Q -- "should be considered as an established
8 cause of lung cancer in humans."
9 Do you agree with that?
10 A Yes, sir.
11 Q "With a relative risk of about 1.3." Is
12 that similar to what you told the jury?
13 A Yes, sir.
14 Q "The establishment of causality, that is,
15 cigarette smoke, secondhand smoke, causing

16 lung cancer, is based not only on
17 epidemiological or statistical studies, but
18 also on the converging biological evidence
19 in support of the association."

20 Is that what you -- biological
21 plausibility you talked about yesterday?

22 A Yes, it is.

23 Q So do you agree with Dr. DeVita?

24 A Yes, sir.

25 Q "Also based on the qualitative similarity of
ROGGLI-REDIRECT

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1 sidestream and mainstream smoke." What does
2 that mean?

3 A It means there may be some mild differences
4 or minute differences that we discussed
5 yesterday; but, overall, qualitatively they
6 are quite similar.

7 Q And then Dr. DeVita says there, talking
8 about sidestream and mainstream smoke,
9 "Unquestionable, no threshold
10 carcinogenicity." What does that mean?

11 A That's what we talked about as well. When
12 you're dealing with proximate carcinogens,
13 those that can cause cancer directly by
14 affecting genes and causing mutations in
15 genes, there is no known threshold
16 identified below which exposure below which
17 people will never get cancer.

18 Q Doctor, on the same page, Dr. DeVita
19 concludes that some data indicate that
20 indoor radon -- weren't you asked about
21 radon?

22 A Yes, sir.

23 Q -- interacts with cigarette smoking,
24 suggesting that smokers may be particularly
25 susceptible to radon-induced lung cancer.

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1 And that most of the lung cancer deaths by
2 radon -- let me read it to you.

3 "Approximately 14 [sic] lung cancer
4 deaths, mostly in smokers, are caused
5 annually in the United States by radon,
6 making radon the second most important cause
7 of lung cancer."

8 Do you agree with that?

9 A Did you say 14? What was that 14?

10 Q Thousand.

11 A 14,000, yes, I agree with that.

12 Q On page 861 he says, "There is an apparent
13 superadditive effect of cigarettes with
14 radon and asbestos, suggesting that these
15 components of tobacco smoke may promote
16 carcinogenesis initiated by other
17 substances."

18 What does that mean?

19 A That means if you have another agent that
20 can cause cancer, like radon, and you're
21 also exposed to cigarette smoke, then these
22 factors act more than additively. They
23 multiply the effect of one upon another.

24 Q He then concludes that the exact risk of

25 indoor exposure to radon remains uncertain.
ROGGLI-REDIRECT
1466

1 Isn't that what you were trying to tell
2 the jury yesterday and today?
3 A Yes, sir.
4 Q Doctor, I want you to assume -- I'll ask you
5 to assume that Mr. Wiley preceded you,
6 Mildred's husband, to the witness stand.
7 Okay?
8 A Okay.
9 Q And this lady or her colleague took all this
10 down and we get a transcript of this at the
11 end of every day. Would you assume that?
12 A Sure.
13 Q The Court permitted Mr. Wiley on redirect to
14 testify --
15 MR. OHLEMEYER: Your Honor, I
16 object to the way these questions are being
17 framed. He can put a hypothetical to this
18 witness and base it on anything he wants but
19 I don't think he should be making speeches
20 on what the Court did or didn't permit or
21 didn't say. He should form his question as
22 a question and let the witness answer. I
23 object to it as being argumentative and
24 leading.
25 THE COURT: Sustained as to that.
ROGGLI-REDIRECT
1467

1 Why don't you rephrase it.
2 MR. MOTLEY: Okay. Can I ask him
3 to assume Mr. Wiley testified?
4 THE COURT: Yes.
5 MR. MOTLEY: That's what I was
6 trying to get to.
7 Q Now, I want you to look at this testimony
8 for a moment from the official, from the
9 record --
10 MR. OHLEMEYER: Your Honor, that's
11 the kind of speech that isn't proper. Let
12 him ask the question and let the witness
13 answer it.
14 MR. MOTLEY: What's wrong with
15 giving the man a transcript of what he said?
16 That's the transcript of Mr. Wiley's
17 testimony taken in the courtroom by these
18 court reporters.
19 THE COURT: He asked him to look at
20 that, he can do that.
21 Q Dr. Roggli, if you assume the accuracy of
22 Mr. Wiley's testimony that you just read
23 yourself, rather than exposed from 1973 --
24 MR. OHLEMEYER: No. Your Honor,
25 may we approach on this?
ROGGLI-REDIRECT
1468

1 (Bench discussion.)
2 THE COURT: The objection to the
3 last line of questioning By Mr. Ohlemeyer is
4 well taken and will be sustained.
5 Go ahead, Mr. Motley.
6 MR. MOTLEY: Yes, sir.

7 Q Doctor, are you aware of nurses' affidavits
8 about the exposure at the VA Hospital?
9 A Yes.
10 Q And is it true or untrue that from 1986 to
11 1991 she continued to be exposed to
12 secondhand smoke while the head nurse?
13 MR. OHLEMEYER: Your Honor, I
14 object to the question as framed as
15 argumentative.
16 THE COURT: Is it true? I think
17 that's the objection.
18 Do you want to rephrase that?
19 Q Do you recall that nurses in sworn
20 affidavits, who are going to testify here in
21 court, stated that from 1986 to 1991 Mildred
22 Wiley continued to be exposed on a regular
23 basis even though she was the head nurse to
24 cigarette smoke in that hospital?
25 MR. OHLEMEYER: It's leading, it's
ROGLI-REDIRECT

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1 hearsay and still argumentative, Your Honor.
2 MR. MOTLEY: I have to put this
3 in --
4 THE COURT: You can answer that.
5 Overruled.
6 A Yes.
7 Q You are aware of that?
8 A I am aware of that, yes, sir.
9 Q When Mr. Ohlemeyer was going through his
10 math up here a little while ago, he
11 restricted you from 1973 to '85; correct?
12 A Yes.
13 Q So your answers would not be the same if you
14 include '86 to '91; correct?
15 A Correct.
16 MR. MOTLEY: May I have a moment,
17 Your Honor?
18 THE COURT: Sure.
19 Q Doctor, turning now to the hospitalization
20 of Mrs. Wiley, okay?
21 A Yes.
22 Q Let me focus on that. You were asked about
23 the various tests that the doctors did to
24 try to ascertain what was her condition. Do
25 you remember that?
ROGLI-REDIRECT

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1 A Yes, sir.
2 Q And you were asked about a sputum cytology?
3 A Yes.
4 Q And I don't know that anyone ever asked you
5 to describe exactly how that's done, but if
6 you would, please, tell the jury.
7 A That is done by having the patient cough
8 into a container and the sputum that the
9 patient coughs up is sent to the laboratory
10 where the sputum is actually smeared on
11 slides and stained and looked at under a
12 microscope to see if cancer cells might be
13 present within it.
14 Q And that test was, I believe, done on June
15 the 16th, 1991.

16 A Yes, sir.
17 Q Is that correct?
18 A Yes, sir.
19 Q Now, sir, from the medical records, isn't it
20 a fact that by June the 16th, for almost two
21 weeks, the doctors who were treating her had
22 already concluded she had primary lung
23 cancer?
24 A My understanding is that there was certainly
25 evidence in the records at that point that

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1 she had cancer, and that there was evidence
2 pointing toward it being in the lung, yes,
3 sir.
4 Q Do you recall that that diagnosis of primary
5 lung cancer was on June the 3rd?
6 A By Dr. Turner, I believe that's correct.
7 Q No. By Dr. Songer.
8 A Dr. Songer, okay.
9 Q And that that was confirmed by Dr. Turner on
10 June the 5th?
11 A Yes, sir.
12 Q So before they did the cytology, they had
13 already diagnosed her condition?
14 A Yes.
15 Q Now, with respect to the bronchoscopes and
16 biopsies that were done, is your opinion
17 that those bronchoscopes and biopsies were
18 negative for cancer?
19 A There were three bronchoscopy washings that
20 were done, and there was one biopsy that was
21 done. Only one of those was said to be
22 negative for cancer.

23 Two of the washings cytologists said
24 there were atypical cells present, that that
25 particular pathologist could not say were

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1 sufficiently abnormal for him to be sure
2 there was cancer but there were atypical
3 cells present.
4 And the biopsy showed dead or necrotic
5 tissue that showed highly pleomorphic
6 atypical cells present which in and of
7 itself is highly suspicious for cancer. And
8 so there is no way one can say that those
9 materials were negative for cancer. That
10 would be very misleading to say that.

11 MR. MOTLEY: This is in evidence,
12 Your Honor.

13 Q June 6, 1991, after the lung cancer
14 diagnosis was made, does this medical record
15 describe what you just said?

16 A Yes, sir, it does.

17 Q And does that support a diagnosis of cancer?

18 A This finding is definitely consistent with
19 the diagnosis of cancer which was
20 subsequently shown to be present in her
21 right middle lobe.

22 MR. MOTLEY: Your Honor, I would
23 like to move this as the next exhibit from
24 the hospital record.

25 I'm going to put this on the screen.
ROGGLI-REDIRECT
1473
1 We move 18, Your Honor.
2 THE COURT: Any objection?
3 MR. OHLEMEYER: No objection, Your
4 Honor.
5 THE COURT: 18 will be admitted.
6 (Plaintiffs' Exhibit(s) 18 received in
7 evidence.)
8 MR. MOTLEY: Show it, please. Can
9 you focus a little better.
10 Q Doctor, this was June 6th, I believe, or
11 June 7th. Would you read that into the
12 record, I'm going to ask you questions about
13 it.
14 A First paragraph?
15 Q Yes.
16 A "Mrs. Wiley is a 56-year-old white female
17 who was admitted on May 29, with a right
18 lung mass, as well as severe bone pain. A
19 myelogram revealed significant necrosis of
20 the L2 pedicle."
21 Q What does that mean?
22 A That's part of the second lumbar vertebra in
23 her spine.
24 "Bone scan revealed widely metastatic
25 lesions in the skull and the femur, as well
ROGGLI-REDIRECT

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1 as ribs. Bronchoscopic evaluation was
2 needed to affirm a primary lesion. The
3 patient was agreeable to the procedure,
4 supplemental oxygen was used at 5 liter
5 nasal cannula. The upper airways were
6 anesthetized with 4 percent Xylocaine."
7 Q What does that mean?
8 A The last sentence?
9 Q Yes. What are they doing?
10 A This is talking about the procedure for the
11 bronchoscopy.
12 Q Okay. Then forget the premedication. Go to
13 the bronchoscope, the next paragraph.
14 A The P10 bronchoscope?
15 Q Yes.
16 A "The P10 bronchoscope was gently inserted
17 through the left naris."
18 Q What's the left naris?
19 A That's the left nostril of the nose. There
20 was a large polyp in the left naris. It was
21 advanced to the level of the cords, the
22 vocal cords in the voicebox.
23 "The cords did oppose normally."
24 Q What does that mean?
25 A That means that they were functioning, there
ROGGLI-REDIRECT

1475
1 was no evidence that the vocal cords were
2 paralyzed.
3 "There was no evidence of abnormalities
4 in the arytenoid structures.
5 Q What is that?
6 A That's a part of the voicebox, the larynx.

7 "Epiglottis."
8 Q What's that?
9 A That's the piece on the top of the larynx
10 that closes off the larynx when you swallow
11 so that food doesn't get down into your
12 lungs.
13 "Or cord structures. One percent
14 Xylocaine was used at this level."
15 Q For what?
16 A That anesthetizes the patient so that the
17 patient doesn't cough or react to the
18 irritation of the bronchoscope.
19 Q Go ahead.
20 A "The bronchoscope was then gently inserted
21 through the cords into the trachea. With
22 visualization of the carina, the carina
23 appeared to be markedly broadened
24 anteriorly."
25 Q What does that mean?

ROGGLI-REDIRECT

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1 A The carina is the point where the windpipe
2 or trachea branches to make the right and
3 left bronchi. And right at that point there
4 is a very sharp point there where the branch
5 occurs, and what she is saying is that it
6 was broadened out more than normal so
7 something was going on in the area of the,
8 of where the bronchi branch off in the
9 trachea.
10 Q Go ahead. I think you were at "the left
11 upper" --
12 A "The left upper lower and lingular segments
13 were inspected carefully. All segments were
14 patent and appeared normal."
15 Q What does that mean?
16 A "The left lung had demonstrable
17 abnormalities. The bronchoscope was then
18 withdrawn and then reinserted into the right
19 main stem. Upon entering the right upper
20 lobe segments, marked mucosal mounding was
21 noted."
22 Q What does that mean, Doctor?
23 A That means normally the lining inside those
24 bronchial tubes is smooth, and what the
25 doctor was seeing, it was heaped up or

ROGGLI-REDIRECT

1477

1 irregular in its shape. It no longer had
2 the normal smoothness present.
3 Q Go ahead.
4 A "No evidence of endobronchial lesions were
5 noted. However, with insertion of a
6 bronchoscope into the bronchus intermedius.
7 There was total occlusion of the airway with
8 tumor and mucosal edema."
9 Q Explain from with "insertion" to "edema."
10 Explain to the jury what that means.
11 A What it means is initially she was looking
12 up into the right upper lobe bronchus, saw
13 the irregularities of the lining. She then
14 looked into the bronchus intermedius which
15 is the part of the bronchus that supplies

16 the bronchial tubes to the right middle lobe
17 and into the right lower lobe, the part
18 right before that branch occurs that she saw
19 swelling of the mucosa.

20 In other words, normally you have lines
21 that are present, sort of like corduroy has
22 lines in it. Well, when you get swelling of
23 the tissue from injury, those lines are
24 lost, and the whole area appears more
25 smooth, and that's when the bronchoscopists

ROGGLI-REDIRECT

1478

1 realize that normal fluid has accumulated in
2 that area of the tissue.

3 Q It says, "There was total occlusion of the
4 airway with tumor and mucosal edema." Tell
5 us just for the record what tumor is. What
6 does that mean and how do you interpret as
7 an expert that particular passage?

8 A Well, this means that in trying to look into
9 the bronchus intermedius that the operator
10 of the bronchoscope noted that the lumen,
11 the inside of the tube, was blocked, and
12 that appeared to be blocked by a mass.

13 Q And she described it as a what?

14 A As a tumor.

15 Q All right. In fact, was this a tumor? She
16 had a tumor in her right lung, right?

17 A She had a tumor in the right middle lobe
18 that was shown by the needle biopsy.

19 Q Okay. Biopsies were obtained after
20 installation of some kind of solution. What
21 kind of solution was that? Just what is it?

22 A 1 to 5,000 epinephrine solution. That
23 epinephrine solution is given to help
24 control bronchospasm and edema in that area.
25 Epinephrine is a hormone typically produced

ROGGLI-REDIRECT

1479

1 by the adrenal glands.

2 Q Multiple brushings were obtained as well.
3 What does it mean to obtain multiple
4 brushings?

5 A Well, one of the ways that the
6 bronchoscopist gets specimens is through the
7 bronchoscope, they have channels and they
8 can put various instruments through those
9 channels and one of the instruments is a
10 brush. It's a very tiny brush that's on the
11 end of a long steel cable. And then they
12 can just brush the areas that they see that
13 are abnormal, and that the brushing will rub
14 off cells that are present in that area, and
15 then the bronchoscopist pulls the brush
16 back, puts the brush in a tube and sends it
17 to pathology to make slides from it.

18 Q Okay. Then it says, "Additional biopsies
19 were not possible, secondary to malfunction
20 of the bronchoscope when a large mucous
21 plug --" what's that word -- "occluded"?

22 A Occluded.

23 Q Partially the what?

24 A The lumen.

25 Q What does that mean?
ROGGLI-REDIRECT 1480

1 A That means that the space that she was
2 looking through into that bronchus
3 intermedius, there was a mucus plug in the
4 way that kept her from being able to go any
5 further.

6 Q "It was felt, given the patient situation,
7 that we would obtain brushings, as well as
8 washings, and not put her through
9 reinsertion of the scope again at least at
10 this point."

11 What does that mean?

12 A That means that they thought the wise thing
13 to do was quit the procedure and not do any
14 more biopsies.

15 Q What does -- in a medical record, in your
16 experience, when the doctor who does this
17 writes impression, what does that mean?

18 A Impression means looking at the total
19 clinical picture of how this patient
20 presented, what her symptoms were, what her
21 findings were on physical examination, and
22 what the bronchoscopist saw through her
23 observations, what her most likely diagnosis
24 is for the case at that point.

25 Q So now, the doctor who wrote this was
ROGGLI-REDIRECT 1481

1 actually looking down into the lungs to the
2 extent she could see?

3 A Yes, sir.

4 Q She was looking at the lung?

5 A Yes, sir.

6 Q And what did that doctor conclude from this
7 record?

8 A The impression is, No. 1, primary neoplastic
9 process right main stem with total occlusion
10 of the bronchus intermedius and obstruction
11 of the middle and lower lobe segments.

12 Q What does that mean, sir?

13 A What that means is that she believed that
14 there was a cancer process present in the
15 bronchial tubes supplying the right lung,
16 and that it had proceeded to such an extent
17 that the right middle and right lower lobes
18 were collapsed because air could not get to
19 them because of the blockage by the tumor
20 and mucous plugs.

21 Q This, while she was alive, and the
22 configuration of the tumor on autopsy, does
23 it teach us anything about whether this
24 started in the lung or metastasized to the
25 lung from the pancreas?
ROGGLI-REDIRECT 1482

1 A This finding, combined with the findings on
2 the bronchoscopic biopsy which showed
3 necrosis and highly pleomorphic atypical
4 tumor cells and the finding at autopsy is
5 diagnostic of primary lung cancer.

6 Q And why is it diagnostic of lung cancer that

7 started in the lung as opposed to lung
8 cancer that started in the bronchus and went
9 to the lung? How were you so certain of
10 that, Doctor?

11 A As we discussed yesterday, pancreatic
12 cancers can metastasize to the bronchus,
13 they can mimic lung cancer and they can be
14 confused with it. But now you're asking for
15 so many unlikely things that you can
16 essentially rule out pancreatic cancer.

17 One, you're asking for the patient to
18 have died of advanced pancreatic cancer when
19 the pathologist did not even see a mass in
20 the pancreas. That's unheard of. I haven't
21 seen or heard of such a case.

22 You're asking that the pancreatic
23 cancer had metastasized -- that one could
24 not see with the naked eye -- had
25 metastasized to another part of the body and

ROGGLI-REDIRECT

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1 bypassed the liver. That's very uncommon
2 for the pancreas to do.

3 We're asking for the metastasis in its
4 lung to be only in one lung, which is an
5 unusual distribution for metastasis from
6 pancreatic cancer.

7 And we're asking that the combined size
8 of this lung mass be at least 20 centimeters
9 when the mass in the pancreas couldn't even
10 be seen with the naked eye.

11 Q What does 20 centimeters mean? Can you draw
12 approximately what that looks like?

13 A Yes. There was a 17 centimeter in maximum
14 dimension mass in the right middle lobe, and
15 an 8 centimeter maximum dimension mass in
16 the right lower lobe. 25 centimeters
17 together make 10 inches from one side to the
18 other.

19 Q Almost a foot long?

20 A Almost.

21 Q Show the jury on this, on Mr. Roggli's
22 chart. I don't want you to draw on that.
23 He's liable to get mad at me. How about put
24 a Post-It on there for me where these two
25 things were.

ROGGLI-REDIRECT

1484

1 A Well, the 17 centimeter mass was replacing
2 most of the right middle lobe, which is
3 supplied, as was shown here by the bronchus
4 intermedius, goes down here, and then the
5 right lower lobe mass was 8 centimeters in
6 size. So I guess we can write the size of
7 them.

8 Q Why don't you write it.

9 A (Witness complies with request.)

10 Q Now, being as old as I am, I was taught
11 about inches, not centimeters. So what is
12 that in inches?

13 A Divided by two and a half. There's two and
14 a half centimeters to an inch, so it's hard
15 for me to do that in my head.

16 Q It's about three inches?
17 A Well, that's a lot more. Yes. Right.
18 About seven.
19 Q Okay.
20 MR. MOTLEY: Your Honor, for ID
21 purposes only, I would like to mark this
22 chart.
23 THE COURT: All right. We'll mark
24 that.
25 MR. MOTLEY: And for ID purposes I
ROGGLI-REDIRECT
1485
1 would like to mark this drawing of the
2 doctor.
3 THE COURT: All right.
4 MR. MOTLEY: With your permission,
5 Your Honor, can I put his initials on here?
6 THE COURT: Fine. Go ahead.
7 BY MR. MOTLEY:
8 Q Middle name L.
9 A L.
10 Q Dr. Roggli, have you --
11 MR. MOTLEY: Judge, I better
12 approach before I ask this question in the
13 abundance of safety.
14 THE COURT: All right.
15 (Bench discussion.)
16 THE COURT: Mr. Motley.
17 MR. MOTLEY: Yes, sir.
18 Q Now, Doctor, you were asked a lot of
19 questions using words like can and possibly.
20 Do you remember all those questions?
21 A Yes, sir.
22 Q When you answered the questions that they
23 asked can this do that, is it possible for
24 this to do that, those kinds of questions,
25 do they arise in your mind to the same
ROGGLI-REDIRECT
1486
1 degree of medical certainty as the questions
2 I've asked you about reasonable degree of
3 certainty? In other words, is can and
4 possibly the same as this?
5 A No.
6 Q Is this more likely or less likely than the
7 answer to the questions I asked you?
8 A Something that's possible is something
9 that's less than probable, and is certainly
10 less than to a reasonable degree of medical
11 certainty.
12 Q Now, Doctor, I want to go to this issue of
13 breast cancer for a moment. Okay?
14 A Sure.
15 Q You were asked a series of questions about,
16 and I'm going to do my best -- why don't I
17 write it and then you pronounce it. Did I
18 write it wrong?
19 A I think it's misspelled, but it's Tamoxifen
20 is the drug.
21 Q Mr. Patrick is the one that spelled it.
22 Would you please look at the screen,
23 sir. Now, have you looked at this prior to
24 today?

25 A Yes, sir, I have.
 ROGGLI-REDIRECT
 1487

1 Q Can you focus on that a little better?
 2 A Yes, sir.
 3 Q The camera. Okay. What does that say?
 4 A It says, "Although a breast primary seems
 5 unlikely, I see no contraindications to
 6 treating patient -- I think that is --
 7 "empirically with anti-hormone therapy --"
 8 Q Based?
 9 A "Based on high C15 -- CA15-3 level."
 10 Q And the doctor who did the -- I guess that's
 11 Dr. Songer.
 12 A Yes, sir.
 13 Q That's his initials. He's going to be here
 14 to testify.
 15 A Yes, sir.
 16 Q But, in any event, what is this thing that
 17 he gave her?
 18 A This is, Tamoxifen is an anti-estrogen
 19 hormone which has been used and is effective
 20 in some cases of breast cancer. And it's
 21 important to realize it has very few side
 22 effects. It's a relatively innocuous drug
 23 compared to some of the cancer chemotherapy
 24 agents that oncologists may use.
 25 Q Now, does the word, although a breast
 ROGGLI-REDIRECT
 1488

1 primary seems unlikely, have any meaning to
 2 you, sir, as a pathologist?
 3 A Yes, sir.
 4 Q And what is it?
 5 A That, I would say, is in the realm of
 6 possibility but not probability.
 7 Q And based on that and the findings at
 8 autopsy, what have you concluded as to
 9 whether or not this is even a remote chance
 10 of being a breast cancer?
 11 A Well, I concluded, first of all, that based
 12 on that being a remote possibility and with
 13 nothing to lose if there was even a 5
 14 percent chance that that's what the patient
 15 had, there was nothing to lose to try to
 16 treat in a patient who had widespread
 17 disease that was obviously dying since the
 18 treatment had very little toxicity, so it
 19 was sort of a desperation measure.
 20 But the overall, I agree with the
 21 overall clinical findings in this case were
 22 not those of breast cancer, and this finding
 23 at autopsy, as we indicated, confirmed a
 24 diagnosis of primary lung cancer.
 25 Q Now, there was an additional test that was
 ROGGLI-REDIRECT
 1489

1 done on her while she was alive on the 12th,
 2 and that is something called a fine,
 3 F-I-N-E, needle aspiration.
 4 A Yes.
 5 Q Would you show the jury what that is.
 6 A Sure. Have we got a picture of the lungs?

7 Q Yes. This is Exhibit 19, for the record.
8 A This isn't what I wanted but it will do.
9 The mass that --
10 Q They may not be able to see. Why don't I
11 hold it and you use your -- use this as a
12 pointer.
13 A The mass that Mrs. Wiley had involving her
14 right middle lobe that was identified at
15 autopsy was very large and replacing most of
16 the right middle lobe. The doctors taking
17 care of a patient like that and trying to
18 make a diagnosis while she is alive have two
19 approaches to it. One is to try to get to
20 the tumor by coming down the endobronchial
21 tree and bronchoscopy in this area. When
22 they tried that, they got necrotic tissue in
23 this area and they got some very atypical
24 cells that the pathologist was not
25 comfortable in saying that he was not sure

ROGGLI-REDIRECT

1490

1 that that was cancer.
2 So the next approach is to let's go
3 from another direction, let's go from the
4 outside of the lung in.
5 Q So they puncture her body where?
6 A They go through the chest between the ribs
7 with a needle that has a very thin core.
8 It's so thin that the patient can almost not
9 feel it going through. It's almost a
10 painless procedure, even though they do do
11 deadening in the area beforehand. And they
12 go through the, between the ribs, through
13 the skin, through the muscle, through the
14 pleura, into the lung, and when they get
15 into the lung, the needle is attached to a
16 syringe and they pull back on the syringe
17 and it pulls cells out of wherever the
18 needle happens to be. And what you try to
19 do is get the needle into the mass, which is
20 present in the lung.
21 Q Meaning these things right here?
22 A Right. Into the mass that's in the lung,
23 and try to get cells back that you then
24 again send that material to the pathologists
25 in the laboratory and ask them what they

ROGGLI-REDIRECT

1491

1 think is present on that specimen.
2 Q And, in fact, they did that?
3 A Yes, sir.
4 Q And let me show you this while you're up
5 here.
6 MR. MOTLEY: This is Exhibit 19
7 that we move into evidence, Your Honor, part
8 of the hospital report of the procedure that
9 he just described. I was going to move it
10 into evidence. I am showing it to him.
11 MR. OHLEMEYER: I have no objection
12 to it, Your Honor.
13 MR. MOTLEY: We'd move it into
14 evidence. I've already marked it, Mr.
15 Cassell, as Exhibit 19. Did I do the right

16 thing?
17 THE COURT: We already had a 19.
18 MR. CASSELL: 21, Judge.
19 THE COURT: 21 will be admitted.
20 (Plaintiffs' Exhibit(s) 21 received in
21 evidence.)
22 Q I'm going to show this on the screen, okay.
23 Doctor, I believe this might be the
24 report of what you just described, if you
25 can confirm that for us, please.

ROGGLI-REDIRECT

1492

1 A Yes. This is described as a fine needle
2 aspiration lung of the right upper lobe
3 which shows adenocarcinoma.
4 Q Of the lung?
5 A Yes.
6 Q Doctor, from the medical records, have you
7 seen absolutely any evidence that any of the
8 doctors who were treating her treated her
9 for pancreatic cancer?
10 A No, sir.
11 Q Did they even have enough suspicion, could
12 they have done a biopsy of the pancreas or
13 done something to try to find that?
14 A Yes, there are a number of procedures one
15 can do to try to diagnose pancreatic cancer
16 in patients certainly before they die.
17 Q So they could have done a needle or
18 something in there?
19 A Yes, sir.
20 Q Did they do that?
21 A No, sir.
22 Q You were asked a question about this big old
23 textbook here called "Pulmonary Pathology"
24 by Dail and Hammar. Do you remember being
25 asked about it?

ROGGLI-REDIRECT

1493

1 A Yes.
2 Q And I believe that your name is in here,
3 isn't it?
4 A Yes, sir, I've contributed a chapter to this
5 textbook.
6 Q You wrote a chapter in this textbook?
7 A Correct.
8 Q Now -- and Mr. Ohlemeyer asked you about
9 this textbook yesterday. Do you remember
10 that?
11 A Yes, sir.
12 Q And I guess since you got a chapter in it,
13 you feel like it's pretty reliable?
14 A I think generally it is, yes, sir.
15 Q And I believe Dr. Hammar sits on that tumor
16 panel you're on, the Canadian and United
17 States Cancer Panel?
18 A Yes, sir, Dr. Hammar is also a member of
19 that panel.
20 Q I want to read you from page 840 and ask you
21 a question.
22 "Sidestream tobacco smoke approximately
23 doubles the equilibrium concentrations of
24 radon decay products in an enclosed room,

25 whatever the initial concentration may be.
 ROGGLI-REDIRECT

1494

1 Thus, environmental tobacco smoke increases
2 the risk of carcinoma posed by atmospheric
3 radon progeny."

4 What does the progeny mean?

5 A Progeny means as -- it's actually the
6 decaying process of radioactive material
7 that releases particles that damage the
8 tissue and cause the cancer.

9 Q Well, do you agree that ETS and radon
10 together ain't good?

11 A Yes, sir.

12 Q Do you agree with Dr. Hammar that 53,000
13 deaths in America occur each year from
14 secondhand tobacco smoke?

15 A 53,000?

16 Q That's what he says on 831.

17 A I think that's a combination of all deaths
18 and I agree with that, yes, sir.

19 MR. MOTLEY: Your Honor, just a
20 moment. I may be almost done here.

21 THE COURT: All right.

22 Q Now, isn't it true, Doctor, that the records
23 reflect that there was only one sputum test
24 done, not three?

25 A That's my understanding. That's what I saw
ROGGLI-REDIRECT

1495

1 in medical records.

2 Q What is the typical presentation of someone
3 who has primary pancreatic cancer, that is,
4 when they go to the doctor or hospital, what
5 symptoms do they describe typically?

6 A The common presentations of pancreatic
7 cancer include abdominal pain in a belt-like
8 distribution, as we indicated before. The
9 patients also, if the tumor involves the
10 head of the pancreas, present with jaundice,
11 which means that they are obstructing the
12 bile flow so that as a result of that bile
13 product's built up in the bloodstream, it
14 turned the patient yellow, gave them a
15 yellow coloration.

16 Q Any evidence that that typical presentation
17 of pancreatic cancer existed in the person
18 of Mildred Wiley?

19 A No, sir, she did not have the typical pain
20 that one associates the pancreatic cancer or
21 pancreatitis, nor did she have jaundice.

22 Q Now, Doctor, why did you not do a mucin
23 stain? Remember you were asked about mucin
24 stain?

25 A Well, as discussed in detail yesterday,
ROGGLI-REDIRECT

1496

adenocarcinomas from many areas of the body
can metastasize to the lung, and
adenocarcinomas from many areas of the body
produce, including the lung, produce mucin,
including the pancreas produce mucin,
including the breast produce mucin, so that

7 a mucin stain is not going to help you make
8 the distinction of where the tumor came
9 from.
10 The only thing that a mucin stain would
11 do in this circumstance would tell you
12 whether the tumor is well differentiated, or
13 moderately differentiated, which would
14 typically produce mucin, or poorly
15 differentiated, as it was in this case,
16 which typically would not produce mucin
17 regardless of where the tumor came from.
18 Q Last question. Mr. Ohlemeyer, you recall,
19 asked you whether or not you make effort,
20 you personally, to avoid cigarette smoking.
21 Do you recall that?
22 A Yes.
23 Q And you said yes?
24 A Yes.
25 Q Did you make efforts to avoid cigarette

ROGGLI-REDIRECT

1497

1 smoking between 1974 and 1980 when you were
2 on the wards at the VA Hospital in Houston?
3 A Nos.
4 Q Why?
5 MR. OHLEMEYER: I object to this as
6 being irrelevant and beyond the scope of the
7 examination.
8 THE COURT: Last question as to why
9 is sustained.
10 Q Were you able to avoid cigarette smoking on
11 the halls of the VA Hospital at Houston
12 between 1974 and 1980, sir?
13 MR. OHLEMEYER: Same question, Your
14 Honor, same objection.
15 MR. MOTLEY: That's not the same
16 question.
17 THE COURT: You may answer that.
18 Q Were you?
19 A I was not able to do it and do my job at the
20 same time.
21 Q And why is that?
22 A Because it was unavoidable to do my job and
23 be around the patients and be around the
24 hospital.
25 Q What's that got to do with smoke? I asked

ROGGLI-REDIRECT

1498

1 you a question about was it possible to
2 avoid smoking in the hospitals, and you said
3 no. I want to know why it was impossible
4 for you to avoid smoke in the hospital
5 between 1974 and 1980.
6 A Because smoking was taking place in many
7 areas of the hospital when I was at that VA
8 Hospital.
9 MR. MOTLEY: Thank you, sir, no
10 further questions.
11 THE COURT: Thank you, Mr. Motley.
12 Mr. Ohlemeyer, any more further
13 questions?
14 MR. OHLEMEYER: I think I could
15 finish this before lunch if you give me a

16 few minutes.

17 RE-CROSS-EXAMINATION

18 BY MR. OHLEMEYER:

19 Q Dr. Roggli, who made the rules about who
20 would smoke and where they could smoke?

21 A It was probably the administrator in that
22 hospital. I'm not sure.

23 Q And who does the administrator for VA
24 Hospital work for?

25 A Works for the government.

ROGGLI-RE-CROSS

1499

1 Q The United States government?

2 A Yes.

3 Q Who does the Surgeon General of the United
4 States work for?

5 A Works for the government.

6 Q Who does the U. S. Environmental Protection
7 Agency work for?

8 A For the government.

9 Q You talked about jaundice as a symptom of
10 pancreatic cancer.

11 A Yes, sir.

12 Q That depends on what part of the pancreas
13 the cancer starts, though, doesn't it?

14 A Yes, sir. As I indicated, jaundice is a
15 symptom of a cancer at the head of the
16 pancreas which is the most common location
17 of pancreatic cancer.

18 Q Cancer can occur in the body and tail?

19 A Can occur in the body and tail, yes, sir.

20 Q Again, Mr. Motley showed you some medical
21 records, and we're going to hear from the
22 doctors who actually created those records,
23 but the fact that adenocarcinoma was found
24 in Mrs. Wiley's lung doesn't prove it
25 started there, does it?

ROGGLI-RE-CROSS

1500

1 A That one piece of information all by itself
2 does not, that's correct.

3 Q You talked about a fine needle aspiration;
4 is that the same thing as a transthoracic
5 needle biopsy?

6 A Yes, sir, essentially.

7 Q Have you ever heard of -- can you tell me
8 why you would do a transthoracic needle
9 biopsy in a patient whose condition was
10 terminal and whose family had requested a no
11 code status?

12 A Well, I think that at that point, at least
13 as far as I'm aware, they did not have a
14 definite diagnosis of cancer and they wanted
15 to make a firm diagnosis of cancer in the
16 patient.

17 Q My question is in general, can you give me a
18 reason as to why in a patient who was
19 terminal and whose family had requested no
20 code status a doctor would order a
21 transthoracic needle biopsy?

22 A To make a diagnosis.

23 Q The diagnosis at that point wouldn't have
24 any effect on the treatment of that patient,

25 would it?

ROGGLI-RECROSS

1501

- 1 A It would have an effect on what diagnosis
2 were put in the record, in the discharge
3 summary, and on the death certificate and so
4 it would be important in that regard.
5 Q When you do a transthoracic needle biopsy,
6 do you have to get the patient's consent?
7 A If a patient is able to give consent. If
8 not, you get the next of kin to give
9 consent.
10 Q What are the risks that you have to advise
11 people of when you do that kind of
12 procedure?
13 A Most common risk of a transthoracic needle
14 aspirate is the creation of a pneumothorax
15 which is air in between the lung and the
16 chest cavity. Less commonly you can get
17 significant bleeding from that.
18 Q And death is one of the potential
19 complications of that procedure?
20 A That's a very, very rare complication of a
21 TTNA, but it can occur.
22 Q It's in the consent form though, usually,
23 isn't it?
24 A I believe so, yes.
25 Q Now, Mr. Motley read you something from that

ROGGLI-RECROSS

1502

- 1 Dail and Hammar book.
2 A Yes.
3 Q And he left out something. The sentence he
4 read to you about environmental tobacco
5 smoke, there was a little number 65 at the
6 end of the sentence. Tell us what those
7 little numbers mean in a medical textbook.
8 A Those are references. That means that the
9 information is summarized from some other
10 source that's been published in the
11 literature.
12 Q And if I go to the end of that sentence he
13 read to you and I look at that No. 65 and I
14 turn two pages later, I see the author or
15 the citation to that reference; right?
16 A I don't know how many pages later but it
17 is -- it would be subsequent in the chapter.
18 Q And what's next to 65 are a couple of
19 people's names, and it says, "A Model for
20 Predicting Lung Cancer Risks Induced by
21 Environmental Levels of Radon."
22 What's a model?
23 A Model usually means a mathematical
24 representation that involves estimates of
25 exposures and from that predicts results.

ROGGLI-RECROSS

1503

- 1 Q Okay. Mr. Motley asked you some questions
2 about how certain you were and how sure you
3 were of certain things. Do you remember
4 that?
5 A Yes.
6 Q Now, given the nature of pathology, it won't

7 surprise you that there may be other
8 pathologists who come to this courtroom who
9 disagree with some of the things you've said
10 or how certainly you believe them; isn't
11 that right?
12 A I think we agreed with that question
13 earlier, yes, sir.
14 Q And that, in your mind, is an honest
15 disagreement, isn't it?
16 A It can be.
17 Q Now, the organizations that Mr. Motley asked
18 you about whose opinions you share about
19 exposure to environmental tobacco smoke?
20 A Yes, sir.
21 Q Did the U.S. Surgeon General form that
22 opinion before 1986?
23 A Not that I'm aware of, no, sir.
24 Q So this would be after 1986?
25 A Yes, sir.

ROGGLI-RECROSS

1504

1 Q Did the EPA form that opinion before 1986?
2 A Not that I'm aware of, no, sir.
3 Q Did the American Cancer Society form that
4 opinion before 1986?
5 A Not that I'm aware of, no, sir.
6 Q Did the World Health Organization form that
7 opinion before 1986?
8 A Not that I know of.
9 Q Now, I was surprised -- let me ask you about
10 the Long Branch, the bar you told us about.
11 A Yes.
12 Q Do you know if that bar is inspected by the
13 Occupational Safety and Health
14 Administration?
15 A I have no idea.
16 Q Do you know if that bar is inspected by the
17 Joint Commission on Hospital Accreditation?
18 A I'm sure it is not.
19 Q Do you know what kind of ventilation system
20 they have in the bar?
21 A Pretty bad.
22 Q Do you know how many people are in that bar
23 when you walk into it on a typical night?
24 A I've actually never been into it. I've only
25 talked to people who have been there.

ROGGLI-RECROSS

1505

1 Q So you've never been there?
2 A Correct.
3 Q So what you told us about the Long Branch is
4 something you know from personal knowledge?
5 A No. Just descriptions from a number of
6 people who have been there.
7 Q You would agree with me, Doctor, that there
8 is a difference between an impression and a
9 diagnosis?
10 A Yes.
11 Q And despite the impressions that Dr. Turner
12 or Dr. Songer might have had, the reason the
13 autopsy was performed in this case was to
14 find the primary site of Mrs. Wiley's
15 cancer.

16 A I think when the doctors make an impression,
17 they realize that they could be wrong, and
18 so that's why the autopsy was requested to
19 see whether or not they were wrong.
20 Q But you would agree with me that the autopsy
21 was performed to find the primary, according
22 to the record that Dr. Turner dictated and
23 signed?
24 A That's what she said, yes.
25 Q And you also agree with me that Mrs. Wiley

ROGGLI-RECROSS

1506

1 apparently told Dr. Turner before she died
2 that she was not exposed to secondhand smoke
3 over the last eight years of her employment
4 at the VA?
5 A That was my understanding of the record,
6 yes, sir.
7 Q So if Mrs. Wiley started in 1973 and took
8 medical leave in 1991, and you back up eight
9 years, that takes you to 1985; right?
10 A Yes.
11 Q But even if you go from 1973 to 1991, that's
12 17 years; right?
13 A 18.
14 Q Well, you're right, it's 18, but if you go
15 from August to May, it's really closer to
16 17, isn't it? But, anyway, you agree with
17 me, don't you, that 17 is less than 20,
18 isn't it?
19 A Yes.
20 Q And it's less than 28, isn't it?
21 A Yes.
22 Q One last couple of questions, Doctor.
23 I was kind of surprised to hear you
24 talk about the design and construction of
25 cigarettes. Because I asked you a question

ROGGLI-RECROSS

1507

1 about that at your deposition. Do you
2 remember that?
3 A Yes.
4 Q I asked you --
5 MR. MOTLEY: Pages, please.
6 Q Certainly. 33. I asked you whether you
7 were an expert on the subject of cigarette
8 design and construction and you told me not
9 specifically. Do you remember that?
10 A Yes.
11 Q Because you're not, are you?
12 A That's correct.
13 Q And these two exhibits Mr. Motley gave you
14 on redirect have to do with the design of
15 cigarettes, don't they?
16 A That's one thing they deal with, yes, sir.
17 Q And there has been, and there had been an
18 effort in the '70s and '80s involving the
19 government and cigarette companies to design
20 what the National Cancer Institute called a
21 less hazardous cigarette; isn't that right?
22 A I've heard of that.
23 Q The Tobacco Working Group was what that was
24 referred to?

25 A Yes.

ROGGLI-RECROSS

1508

1 Q And one of the things the Tobacco Working
2 Group concluded was that tar and nicotine
3 delivery of cigarettes should be reduced;
4 isn't that right?

5 A Yes.

6 Q And, in fact, the tar and nicotine delivery
7 on average of cigarettes sold today is about
8 a fourth of what it was in the '50s; isn't
9 that right?

10 A That's my understanding, yes, sir.

11 Q And another thing that the National Cancer
12 Institute and the Tobacco Working Group did
13 was recommend that biological assays like
14 skin painting be used to measure or test the
15 progress that was being made along those
16 lines. Isn't that right?

17 A Yes, sir.

18 Q And, in fact, everything the National Cancer
19 Institute and everything the Tobacco Working
20 Group concluded that should be done to
21 cigarettes in order to make a less hazardous
22 cigarette was already being done by
23 companies that were making cigarettes at the
24 time the National Cancer Institute and
25 Tobacco Working Group made those

ROGGLI-RECROSS

1509

1 recommendations. Isn't that right?

2 A I don't know enough about the details of
3 those recommendations to know whether or not
4 they were all done by the companies.

5 MR. OHLEMEYER: That's all I have,
6 Your Honor.

7 THE COURT: Thank you, Counselor.

8 MR. FURR: Your Honor, may I have
9 two minutes?

10 THE COURT: Mr. Furr, go ahead.

11 RECROSS-EXAMINATION (CONT.)

12 BY MR. FURR:

13 Q Dr. Roggli, you and Mr. Motley looked at the
14 DeVita textbook and you talked about there
15 being no threshold for carcinogens that
16 induce cancer through a process of
17 mutagenesis. Do you recall that?

18 A Yes, sir.

19 Q Air pollution would be an example of a
20 carcinogen that induces cancer through
21 mutagenesis, wouldn't it?

22 A Could be.

23 Q And radon would also be an example of a
24 carcinogen that induces cancer through
25 mutagenesis?

ROGGLI-RECROSS

1510

1 A Yes, sir, it was.

2 Q You and Mr. Motley also talked about whether
3 or not there is some type of interaction
4 between radon exposure and environmental
5 tobacco smoke exposure. Right?

6 A Yes.

7 Q Dr. Roggli, there have been epidemiologic
8 studies conducted to determine whether or
9 not there is an interaction between radon
10 and environmental tobacco smoke exposure
11 that increases the risk of lung cancer in
12 nonsmokers, aren't there?
13 A I'm not aware of such studies.
14 Q You're not aware of such studies?
15 A That's correct.
16 Q Have you attempted to conduct literature
17 research to find those studies?
18 A I've looked at a lot of studies in the
19 literature that had to do with environmental
20 tobacco smoke and lung cancer and I've not
21 seen those studies.
22 Q Isn't it true, Dr. Roggli, that the U. S.
23 Environmental Protection Agency report that
24 we've been talking about, in an earlier
25 draft of that report there was a chapter

ROGGLI-RECROSS

1511

1 devoted to whether or not there was an
2 interaction between environmental tobacco
3 smoke and radon and that the SAB to the
4 U. S. Environmental Protection Agency told
5 them to take that chapter out because there
6 was no evidence to support it?

7 A I don't know.
8 Q Not familiar with that?
9 A No.

10 MR. FURR: Okay. Thank you.

11 MR. MOTLEY: May I have two
12 questions, Judge?

13 THE COURT: Go ahead.

14 REDIRECT EXAMINATION (CONT.)

15 BY MR. MOTLEY:

16 Q Doctor, is 31 larger than 28?

17 A Yes, sir.

18 MR. MOTLEY: Last question, Your
19 Honor. I move the admission of Exhibit
20 33608.

21 MR. OHLEMEYER: Object to it for
22 all the same reasons, Your Honor.

23 (Bench discussion)

24 THE COURT: Any other questions for
25 your witness, Mr. Motley?

ROGGLI-REDIRECT (CONT.)

1512

1 MR. MOTLEY: No, Your Honor. Thank
2 you very much.

3 And thank you, Doctor.

4 THE COURT: Mr. Ohlemeyer?

5 MR. OHLEMEYER: No, thank you.

6 THE COURT: Mr. Furr?

7 MR. FURR: No, thank you. I'll see
8 you in North Carolina.

9 THE COURT: Thank you for coming.
10 We'll take the noon break, ladies and
11 gentlemen.

12 (Standard admonition)

13 MR. CASSELL: All rise.

14 THE COURT: Counsel, we'll meet
15 again at about quarter til 1:00 and deal

16 with the subpoena issue.
17 MR. OHLEMEYER: Thank you.
18 (A lunch recess was taken.)
19 MR. CASSELL: All rise.
20 (Out of presence of jury)
21 THE COURT: Thank you. You can be
22 seated. We have a matter to resolve out of
23 the presence of the jury. Oral motion to
24 quash has been made regarding the subpoena
25 to Mr. Bruce Sheffler.

1513

1 Would you care to respond, Mr. Motley?
2 MR. MOTLEY: Yes, Your Honor. May
3 I first hand Your Honor a copy of the
4 subpoena? I assume the defendants have a
5 copy of it.
6 THE COURT: Yes.
7 MR. MOTLEY: Your Honor, for the
8 record, Mr. Sheffler, to our knowledge, has
9 never made an appearance in this case. That
10 doesn't mean his law firm hasn't. I'm just
11 talking about Mr. Sheffler.
12 Your Honor, Mr. Sheffler is a partner
13 at Chadbourne & Parke in New York. It's a
14 New York law firm, has offices in other
15 countries also. Judge, American Tobacco
16 Company, until about two years ago, was a
17 self-standing, that is, not controlled or
18 owned by anyone else, tobacco company which
19 at one point in time acquired a company
20 called Gallahers. The American Tobacco
21 Company was sued in this case. They were
22 then acquired or merged with Brown &
23 Williamson.
24 In this case we moved -- we conducted
25 extensive discovery against American Tobacco

1514

1 Company. Indeed, Your Honor, on several
2 occasions we requested documents from
3 American Tobacco Company. All of this was
4 in the record. They finally -- the response
5 is to the responses of the American Tobacco
6 Company to Plaintiffs' Third Request for
7 Production of Documents, request No. 1, on
8 page 6, and they started off with a page and
9 a half of boilerplate objections, and then
10 said as follows:

11 Subject to and without waiving its
12 objections, American Tobacco will produce to
13 the plaintiffs copies of non-privileged
14 documents dated between January 1st, 1954,
15 and June the 24th, 1991, that refer to,
16 describe, or mention environmental tobacco
17 smoke as a possible cause of lung cancer in
18 humans or animals.

19 Your Honor, what they did not provide
20 us is a document that has just emerged from
21 the litigation in Minnesota about which I
22 will have more to say in a moment. Which is
23 probably the single-most damning document
24 against the American Tobacco Company. I'll
25 give Your Honor a copy of it. This is not

1515

1 on our exhibit list, although we've been
2 mightily seeking for these things for a long
3 time.

4 Your Honor, this document is an
5 in-house review from the head of research of
6 Gallahers which later was acquired by
7 American Tobacco Company. And it's in
8 regard to a very, as you will learn as this
9 case gets into the so-called conspiracy
10 phase, you will learn that there was a very
11 famous study done funded by the American
12 Cancer Society on dogs, beagle dogs, called
13 the Auerbach (phonetic) Hammond beagle
14 experiment. And you will see, Your Honor,
15 that that's what the subject of this memo
16 is.

17 Now, the defendants launched a
18 campaign, including newspaper ads, bought
19 and paid for science stories, and a general
20 denigration of the results of this study
21 which the authors concluded demonstrated
22 that when you exposed dogs to smoke in a
23 very clever way that they invented, those
24 dogs developed lung cancer, human-like lung
25 cancer, and other changes in the body.

1516

1 As you will hear in this case, Your
2 Honor, the defendants have maintained since
3 all the way up until the opening statement
4 here in this case that there has never been
5 an animal experiment that's established that
6 cigarette smoke caused lung cancer in
7 animals.

8 Now, the interesting part about that,
9 Judge, is that the way that most of the
10 experiments were conducted were ways that
11 are relevant to environmental tobacco smoke,
12 although I don't believe that's our burden.
13 I think we show the cigarettes are
14 dangerous, we don't have to be specific to
15 ETS. That's a defense.

16 But in this case, Your Honor, if you
17 please look, sir, on the second page, item
18 No. 3, the head of research of Gallahers
19 says, In spite of the qualifications in
20 numbers 1 and 2, the two paragraphs
21 previous, we believe that the work proves
22 beyond reasonable doubt that fresh whole
23 cigarette smoke is carcinogenic to the lungs
24 and, therefore, it is highly likely that it
25 is carcinogenic to human lungs, in human

1517

1 lungs.

2 Your Honor, that is a position that is
3 180 degrees the opposite of the position
4 that these companies asserted in newspaper
5 ads, in courts around the country. This
6 document, Your Honor, has never been
7 disgorged from the bowels of the tobacco
8 companies or their lawyers until this last
9 week. And that's what leads us to this
10 opinion. Two other things about it. This
11 is just one of many, many, many, many

12 documents.
13 On page 3, relevant to this case,
14 Although the results of the research would
15 appear to us to remove -- remove the
16 controversy regarding the causation of the
17 majority of human lung cancers, it does not
18 help us directly with the problem of how to
19 modify our cigarettes. In other words, now
20 that we know it causes cancer in humans,
21 what do we do to modify our cigarettes.
22 And then the concluding paragraph, Your
23 Honor, is, To sum up, we're of the opinion
24 that Auerbach's work proves beyond all
25 reasonable doubt the causation of lung

1518

1 cancer by smoke.
2 And then he qualifies it, as he did in
3 paragraph 1 or 2, about the surgical
4 technique that they utilized.
5 Judge, our experts in this case have
6 been deposed in this case. This is of the
7 essence of the fraud that's been committed
8 on the public of the United States. These
9 defendants, Your Honor, have gone to
10 Congress, they have gone to the Federal
11 Trade Commission, they've gone to the Food
12 and Drug Administration, including American
13 Tobacco Company, which had access to this
14 document and, Your Honor, they just flat out
15 committed perjury with respect to the
16 Auerbach document and the conclusions of the
17 Auerbach study.
18 The Tobacco Institute, of which the
19 American Tobacco Company is a member and has
20 been since its inception, had launched a
21 million dollar campaign to discredit the
22 Auerbach and Hammond works, all the while
23 with this information available.

24 Now, let me get to the subpoena.
25 Mr. Sheffler's firm, Chadbourne & Parke,
1519

1 have represented American Tobacco Company
2 for decades. Indeed, my understanding is
3 they represented them at the time of this
4 document, which is 1970. And I can confirm
5 that, Your Honor, over the weekend.
6 They did not produce this document --
7 American Tobacco Company did not produce
8 this document in this case. They haven't
9 produced it in any case. I stand as an
10 officer of the Court and tell you that in
11 four years of tobacco litigation I've been
12 involved in, we never saw this document. We
13 conducted as extensive discovery as has ever
14 been conducted in the United States in the
15 state of Florida Medicaid case, and this
16 document was never forthcoming.

17 All right. Your Honor, in a December
18 30, 1997 order, the Minnesota court -- do we
19 have copies yet?

20 The Court noted -- Judge Fitzpatrick,
21 Your Honor, is the judge that has been
22 especially assigned to the state of

23 Minnesota Medicaid case, which you know is
24 on trial at the same time we're on trial
25 here.

1520

1 This motion was for sanctions, Your
2 Honor, and these are the findings of the
3 court on page 2: Whereas, in light of
4 almost 100 years of cigarette manufacture
5 and sale by American and its affiliates,
6 American's substantive document production
7 and responses to discovery in this case are
8 miniscule and incomplete.

9 Whereas, American has evolved through a
10 number of corporate reorganizations, some
11 precomplaint and some more tellingly
12 post-complaint, and is now related as parent
13 subsidiary or sister subsidiary to Fortune
14 Brands, Inc., formerly American Brands,
15 Inc., Gallahers Limited -- and that's the
16 company, that document is Gallahers
17 Limited -- of the UK and Brown & Williamson,
18 successor by merger to American.

19 Whereas, on May 8, 1997, the Court
20 filed its order granting plaintiff's motion
21 to compel relating to depositions of Brown &
22 Williamson Tobacco Corporation and the
23 American Tobacco Company -- and he refers to
24 the order that he filed -- ordering B&W and
25 American to provide complete, full, and

1521

1 unevasive questions -- answers to specific
2 questions regarding the existence and
3 location of smoking and health research
4 documents.

5 Whereas, on May 19, 1997, B&W and
6 American filed purported responses to the
7 questions set forth in the May 8th order
8 challenging, however, the Court's authority
9 to seek such information, which they
10 described as beyond the scope of reasonable
11 inquiry and inconsistent with the case
12 management order.

13 Whereas, plaintiffs moved for
14 enforcement of the May 8 order and for
15 sanctions against American on June 3. B&W,
16 as successor by merger to American, filed
17 this memo in opposition on June 9th and the
18 matter was heard on June 17th.

19 Whereas, on June the 18th, 1997, the
20 Court issued its order for enforcement of
21 the order of May the 8th and notice of
22 hearing for sanctions, finding that B&W and
23 American willfully violated the order of
24 this Court, failing to produce the documents
25 to answer the questions in a complete and

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1 unevasive manner as required by the May 8th
2 order.

3 Whereas, the Court scheduled a
4 sanctions hearing to take place on June 24,
5 giving the defendants fair notice.

6 Whereas, rather than showing the good
7 faith effort to comply with the May 8 and

8 June 18th orders, B&W sought relief in the
9 Court of Appeals in no fewer than three
10 ways, and he describes what they did.
11 Whereas, on July 22, 1997, the
12 Minnesota Court of Appeals denied relief of
13 any sort to B&W flatly stating -- this is
14 the Court of Appeals. "We are troubled by
15 the numerous requests for interlocutory
16 review of non-dispositive pretrial rulings
17 in this litigation. We caution Counsel that
18 awards of attorney's fees or sanctions may
19 be made in the future."

20 Now, Judge, that's pretty strong words
21 coming out of a court of appeals, no matter
22 what state it might be located in.

23 Whereas, despite the Appellate Court's
24 admonition, B&W petitioned the Minnesota
25 Supreme Court for a writ of prohibition.

1523

1 Whereas on November 19th, the Minnesota
2 Supreme Court denied the petitions filed by
3 B&W for further appellate review of the May
4 8 and June 18th orders.

5 Whereas, pursuant to the Court's
6 September order, the parties were granted
7 the opportunity to file simultaneous briefs
8 relating to appropriate sanctions, which
9 brief the parties agreed to file by November
10 28th. Then it says when they file their
11 pleadings.

12 Whereas, less than ten hours of the
13 scheduled sanctions hearing, B&W filed
14 supplemental responses to the questions set
15 forth in the Court's May 8th order, which
16 long awaited responses the Court hereby
17 finds to be incomplete, evasive, and lacking
18 in good faith and due diligence, and he
19 cites a footnote, Your Honor, which I won't
20 trouble Your Honor by reading.

21 Whereas, the Court finds American and
22 B&W to remain in willful violation of this
23 Court's May and June orders.

24 Whereas, the Court finds that B&W and
25 American received repeated sufficient notice

1524

1 that the plaintiffs were seeking sanctions
2 and that the Court would consider imposing
3 sanctions and, therefore, their argument
4 that they were denied due process is
5 frivolous.

6 Whereas, the Court finds B&W's argument
7 that it is impossible for them to obtain
8 documents highly suspect and disingenuous,
9 considering that no matter what corporate
10 reorganizations were reported to be in the
11 planning stages, no one can deny that the
12 entity known as American, which was a
13 subsidiary of American Brands and a sister
14 subsidiary of Gallahers, was in existence
15 when the complaint was filed in August of
16 1994.

17 The sale of American to B&W and the
18 alleged transfer of all American documents

19 by American Brands to B&W, and the later
20 legal severance of corporate relationships
21 to American Brands and Gallahers, occurred
22 post-complaint, in December of '94.
23 That's true here too, Your Honor, in
24 your case.
25 The of American and B&W, B&W emerging
1525
1 as successor, did not occur until some
2 months later in 1995. The fact that
3 discovery commenced after the sale and
4 merger is irrelevant. In our case discovery
5 occurred before that.
6 While defendants attempt to distinguish
7 some cases, they offered distinctions
8 without a difference. These cases -- then
9 he discussed some cases which I won't bore
10 you with, Your Honor.
11 Moreover, on the next page, not even
12 their own Counsel takes the separate
13 entities argument seriously as they
14 consistently failed to distinguish among
15 five of the defendants, for example. Then
16 they talk about Chadbourne & Parke, Your
17 Honor. You see that at paragraph A where at
18 one hearing he says he's representing
19 American and then on behalf of BATCO. In
20 other words, he's showing up for anybody
21 that looks like a bat.
22 They go through some other examples,
23 Your Honor, of what they've done.
24 Then on page 7: Whereas, the Court has
25 the authority and discretion to impose a
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1 variety of different sanctions for activity
2 contemptuous of the Court in order that the
3 authority of the judicial system does not
4 continue to be flaunted.
5 Whereas, the Court finds the plaintiffs
6 have been prejudiced by B&W's and American's
7 blatant disregard for court orders in this
8 matter and the seven-month delay occasioned
9 by B&W's and American's filing of frivolous
10 appeals.
11 Whereas, in light of the joint
12 defense -- which is the same they got here,
13 Judge, they claim a joint defense here --
14 claimed by the defendants in this action, a
15 corporate cooperative history extending back
16 more than 40 years, the Court suggests the
17 other defendants encourage B&W's and
18 American's compliance with the order of this
19 Court, lest their disdainful violations be
20 found to taint all defendants.
21 Whereas, this Court concludes that
22 sanctions are necessary because they have
23 blatantly disobeyed an order of the Court.
24 They continue to be contemptuous of such
25 order, and have challenged the authority of
1527
1 the judicial system and impugned the
2 integrity of that system.
3 Whereas, the Court determines such

4 sanctions must be sufficiently harsh to
5 chill any further willful disregard of the
6 judicial system. And he cites a case of what
7 the standard is on page 8.

8 Whereas, in addition to the reasons set
9 forth above, the Court finds that harsh
10 sanctions are required in this matter
11 because even immediate compliance by
12 American and Brown & Williamson will not
13 cure the prejudice plaintiffs suffer due to
14 the abuse of discovery.

15 Trial in this action will commence on
16 January 20, 1990.

17 And then Your Honor, it did, in fact,
18 commence on that day.

19 Whereas, in order to place the monetary
20 sanctions in appropriate perspective, the
21 Court notes that BAT, Big BAT, as parent of
22 B&W, earned sales in excess of one billion
23 British pounds; and American's successor,
24 B&W, had a domestic operating profit of
25 approximately \$880 million in 1996.

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1 Therefore, it is hereby ordered all
2 alleged claims of privilege, whether
3 attorney-client or work product, shall be
4 stricken with respect to each document set
5 forth in Exhibit 12, the affidavit of Gary
6 Wilson filed November 28, 1997.

7 Your Honor, we don't have that
8 affidavit but certainly this Gallahers memo
9 from R & D can't possibly claimed to be
10 privileged, because on its face it's not
11 written by a lawyer or sent to a lawyer and
12 certainly doesn't say any reference to any
13 litigation.

14 This paragraph shall not apply to
15 documents for which the remaining defendants
16 have asserted a timely claim of joint
17 defense privilege.

18 Number 2. The supplemental responses
19 of B&W to the Court's questions filed on
20 September of 1997 shall be immediately
21 unsealed. B&W and American shall pay the
22 cost and expenses incurred by plaintiffs,
23 including reasonable attorney's fees to
24 litigate the issue of B&W's and American's
25 discovery abuses, including fees and costs,

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1 et cetera, et cetera.

2 Number 4, B&W and American shall
3 immediately pay to the Clerk of Court as a
4 monetary sanction the sum of \$100,000.
5 Should B&W and American remain in violation
6 of the Court's order ten days after filing
7 of this order, B&W shall and American shall
8 pay to the Clerk of Court the sum of
9 \$100,000 for each day thereafter during
10 which defendants fail to comply, said sums
11 being in addition to the initial monetary
12 sanction.

13 Then he says he may have to find a
14 better way to encourage them if that doesn't

15 get their attention.
16 In light of the prejudice of the cases
17 incurred by plaintiffs as a result of these
18 abuses, the Court will impose one or a
19 combination of the following three sanctions
20 to be determined by the Court. Then he's
21 got the three different options, and he
22 talks about striking to draw a negative
23 inference for failure to produce it, enter
24 default judgment, et cetera.

25 Your Honor, with that background, the
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1 reason I'm giving you this background,
2 Judge, is Your Honor entered an order, I
3 believe in September, freezing the record.
4 And the reason I'm bringing this up, Your
5 Honor, is we've tried to get these
6 documents, not just in this case, but we
7 tried in this case, and these documents were
8 not forthcoming.

9 Your Honor, there's been so much going
10 on all around the country in state cases,
11 including the Indiana state case, where the
12 Attorneys General have tried to get this
13 information. This document is a testament
14 to why they hid it.

15 Now, let me turn specifically to what's
16 happened since the Judge's order.

17 Judge, B&W has now turned around and is
18 going after Chadbourne & Parke. And I will
19 give you, show Your Honor that B&W doesn't
20 like that \$100,000 a day. So now they're
21 trying to find -- they started trying to
22 chase down, well, what did happen to all
23 these documents?

24 It's reminiscent of Lou and Costello,
25 Your Honor, who's on first. Nobody seems

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1 for a while claims that knew where these
2 documents are. And what I've given Your
3 Honor, is, we've just obtained these
4 documents, the Court has now unsealed this
5 sorry paper trail of abuse of his order, and
6 I would -- indeed, abuse of these, I would
7 say, by inference, Your Honor, abuse of this
8 Court and the procedures here.

9 And we have attached all these letters,
10 Your Honor, demonstrating that as late as
11 February 11, 1998, the last document,
12 Kirkland & Ellis, Your Honor, who is
13 national counsel for Brown & Williamson, is
14 now trying to take the deposition of a
15 former Chadbourne & Parke lawyer named Janet
16 Brown. Janet Brown, Your Honor, represented
17 American Tobacco Company in the '60s and
18 '70s, served on something that you'll hear
19 is called the ad hoc committee which was the
20 private lawyers who are, we claim, it the
21 epicenter of the alleged conspiracy here to
22 withhold information from the government,
23 the public, and various courts around the
24 country.

25 Your Honor, if you look through this,

1 you'll all see here that for a long time
2 nobody would claim to know what happened to
3 these documents, you see. So now you got
4 the lawyers who represent Brown & Williamson
5 subpoenaing the lawyers who used to
6 represent American Tobacco Company to try to
7 find -- chase this rabbit and find out
8 exactly what trail we're in.

9 Your Honor, I think Mr. Sheffler's
10 showing up here was very helpful to us, and
11 we are very serious about taking his
12 deposition and, Your Honor, ordering him to
13 bring all of these same documents that the
14 State of Minnesota, to the cost of Brown &
15 Williamson of \$100,000 a day, should be
16 required to produce these documents in Your
17 Honor's court and we pray for relief from
18 Your Honor's order of September 1, 1997.

19 You see, Your Honor, the torturous
20 trail here of people trying to get these
21 documents, they're relying on good faith
22 representations. When Gallahers says --
23 excuse me. When American Tobacco Company in
24 this case in response to the third request
25 to produce says we're going to give you

1 everything we got and they don't give you
2 any of this, Your Honor, that's not fair,
3 that's trial by ambush, and I'm not asking
4 Your Honor at this time to impose sanctions
5 against them. I'm just asking Your Honor to
6 make Mr. Sheffler show up with a truck full
7 of documents or an empty box, if that's all
8 he's got, and let us ask him some questions,
9 Your Honor.

10 And also I'm asking for relief, Judge.
11 I'm asking for relief from your September
12 order for the reasons that I've just
13 enunciated. We've been trying to get these
14 documents. Your Honor may recall, we
15 brought to your attention the documents that
16 were produced in Minnesota, and I can
17 testify to this personally, we've been
18 trying to get Liggett's documents,
19 privileged documents, for over a year and a
20 half. And finally in Minnesota -- we got
21 some deprivileged in Florida. But 830 some
22 odd documents by Liggett to which these
23 defendants claim the joint defense privilege
24 were found to be crime fraud were
25 deprivileged and were given to the Congress

1 of the United States in November, I believe
2 it was, of 1997, after Your Honor's
3 September order.

4 My point here, Judge, is there are a
5 lot of these documents that we now have and
6 they deal with the issues before Your Honor.
7 And the plaintiffs should not be punished
8 here because, as the court in Minnesota
9 found, there is this pattern of conduct that
10 dates way back, Your Honor, to 1970 was the

11 first time a judge issued an order about the
12 discovery abuses of these defendants.

13 And I can -- I will respond to whatever
14 they say. I'll give you some more examples
15 of discovery abuses, if you'd like, but
16 Mr. Sheffler has got some valuable
17 information, he needs to be here and he
18 needs to bring it.

19 Secondly, Your Honor, I respectfully
20 urge you, whatever you do about the
21 subpoena, I respectfully urge we've made a
22 sufficient case that we should be relieved
23 of the September deadline. These are their
24 documents. They've had them, they's studied
25 them, they known about them. We don't.

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1 THE COURT: Thank you, Mr. Motley.
2 Mr. Shockley, any other comment in
3 support of your motion to quash?

4 MR. OHLEMEYER: If you don't mind,
5 Your Honor, may I?

6 THE COURT: That's fine, if it's
7 all right with Mr. Shockley.

8 MR. OHLEMEYER: I take it every now
9 and then Paul Harvey is on the radio around
10 here.

11 THE COURT: Every now and then.

12 MR. OHLEMEYER: Your Honor,
13 Mr. Motley is making some very serious
14 charges at a very curious time in the day
15 and in the case. This case was filed in
16 1993. The lawyers -- and there are about
17 eight of them who represent the Wiley
18 family -- never took a single fact
19 deposition of a cigarette company employee
20 during the entire four or five years this
21 case was prepared for trial. They never
22 served a 30(b)(6) discovery request asking
23 these companies to identify witnesses for
24 subject matters or subject areas. They
25 served extensive document requests on these

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1 companies.

2 And I'm a little surprised to hear
3 Mr. Motley tell the Court, as an officer of
4 the Court, what was in those requests;
5 because, with respect to American Tobacco
6 Company, 65 boxes of documents were
7 produced. Not a one was opened by the
8 plaintiff's lawyers the look at them.

9 Philip Morris rented space in an office
10 building to put their documents, they came
11 over and looked at a few, and there are
12 hundreds of boxes they didn't look at. For
13 Mr. Motley to tell you that nothing was
14 produced in this case is just reckless in
15 its disregard for the truth.

16 So I think what's going on here, Your
17 Honor -- and by the way, if they had looked
18 at the documents and thought they didn't
19 comport with the requests or the responses,
20 they could have moved to compel further
21 responses. They could have moved in this

22 case for sanctions for anything they thought
23 was sanctionable.

24 What I think Mr. Motley is doing, Your
25 Honor, is taking up the Court's time, taking
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1 up the jury's time in an effort to prejudice
2 the Court, to prejudice the community
3 through the media, and to do everything but
4 try the case that we are here to try.

5 Look, for example, at the order he
6 handed you out of the Minnesota court, Your
7 Honor. It's dated December 30, 1997. That
8 was two weeks before the pretrial conference
9 in this case. It was certainly before the
10 start of this trial.

11 Here we are on the fourth day of trial
12 at 1:15 in the afternoon, and Mr. Motley is
13 trying to tell you about something that
14 happened in a different case involving
15 different lawyers and different issues that
16 could have been brought to the Court's
17 attention long before today.

18 One brief comment about the other facts
19 he told you about. The Auerbach study was
20 not a study that was conducted at a
21 cigarette company. It was done by a doctor
22 somewhere else. It was published, a lot of
23 debate about it, there's been a lot of
24 discussion about it in scientific and
25 medical literature ever since it was

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1 published.

2 Mr. Motley has a lot of cases in a lot
3 of different places, and they are very
4 contentious because they involve broad and
5 wide-ranging issues, much broader than we're
6 here to decide in this case.

7 There is discovery going on in those
8 cases, Your Honor, there are disputes in
9 those cases, there are special masters in
10 those cases, there are judges and there are
11 appeals going on in those cases.

12 What Mr. Motley has put before the case
13 in the guise of the subpoena to Mr. Sheffler
14 is a discovery request. It requests
15 documents that are in the possession of
16 non-parties to the case. Gallahers is not a
17 party to this case. I don't represent
18 Gallahers. I can't stand here and defend a
19 subpoena that has to do with anything that
20 Gallahers may have an interest in.

21 So what we're embarked on here is
22 something that has nothing to do with the
23 case we're here to try. It's something that
24 could have been brought to the Court's
25 attention at a variety of points in time

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1 during the progress of this case if it had
2 anything to do with this case.

3 And the fact is, Your Honor, there is a
4 lot going on in this world that has
5 something to do with cigarette companies and
6 it has something to do with the tobacco and

7 something to do with Mr. Motley's lawsuits
8 in other states, but it doesn't have
9 anything to do with the issues we're here to
10 decide.

11 And with all due respect, Your Honor,
12 the sooner we start trying this case, the
13 sooner we'll have the jury in the box, the
14 sooner we'll all be out of town, and the
15 sooner we can get on with the rest of our
16 lives.

17 And I really think that the Court
18 should not prolong this any longer. I think
19 you should quash it, and I think we should
20 move on and try the Wiley case.

21 MR. MOTLEY: Could I respond just
22 briefly, Your Honor?

23 THE COURT: Certainly.

24 MR. MOTLEY: Mr. Riley advises me
25 that he tried to take the depositions of the
1540

1 CEOs and was told that they would not
2 produce them. I didn't make that request.
3 I have asked Mr. Riley to confirm that, that
4 he did, in fact, make that request.

5 MR. RILEY: I had requested from
6 the defendants dates to depose their CEOs.
7 I was told they were would not be given to
8 me.

9 I would like to correct something on
10 Mr. Ohlemeyer only with regard to the
11 production of documents. And I'm the local
12 counsel here and would be able to attest to
13 the truth.

14 We went to Krieg DeVault, and Jim
15 McIntire met with us when we reviewed the
16 documents that RJ Reynolds produced. We
17 went to Philip Morris and Dave Tittle was
18 there, and I went through, I think, 18 boxes
19 or more. We went to Doug Hill's office
20 where documents were produced for Lorillard
21 and reviewed, I don't know how many, 20.
22 We've been to CTR and reviewed how may? 40.
23 We've been to TI and reviewed their
24 documents.

25 So to indicate that we did not review
1541
1 any documents is a misstatement to this
2 Court.

3 MR. OHLEMEYER: Your Honor, I
4 didn't suggest they didn't review documents.
5 I suggested there are boxes and rooms full
6 of documents that they didn't review.

7 The second point is there was never --

8 MR. MOTLEY: Can I finish my
9 argument?

10 THE COURT: One at a time.

11 MR. OHLEMEYER: There was never a
12 deposition notice served for any deposition
13 of a company witness in this case.

14 MR. SHOCKLEY: Judge, let me speak
15 to this. This argument is about and the
16 subpoena is directed to Chadbourne & Parke's
17 records and American Tobacco's records. And

18 the compliance or non-compliance of American
19 Tobacco with the Request for Production
20 served upon it, served upon me as its
21 Counsel in this case.

22 Now, I don't know what Mr. Riley did
23 with respect to all these other defendants
24 and their records, but I received 65 boxes
25 of documents from Chadbourne in response to
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1 that Request for Production. I wrote the
2 plaintiffs' counsel and informed them of
3 that fact.

4 One of the Youngs called me to ask
5 exactly what they were and what they were in
6 response to, and I told him. They sat in my
7 office; the tape was never cut; nobody ever
8 called me and asked to come and see them.
9 That's the basis.

10 I don't care about what it has to do
11 with any of these other defendants. But it
12 is a fact and there was no plaintiffs'
13 counsel and there's no representative of
14 Plaintiffs' counsel that can tell you that
15 they ever looked at these documents, ever
16 made a request to look at these documents.
17 And we sent them a letter and said, I have
18 them now, come and get them, come and see
19 them, and the discovery deadline just
20 passed. And that's what happened.

21 MR. MOTLEY: May I respond, Your
22 Honor?

23 THE COURT: Go ahead, Mr. Motley.

24 MR. MOTLEY: I would be willing to
25 bet my pro hoc vici that you won't find
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1 these documents in those 65, because they
2 produced the same 65 in the state of
3 Minnesota. You won't find a first Gallahers
4 document in any of those boxes that relate
5 to the issues in this case. None. Zero.

6 THE COURT: Mr. Motley, let me ask
7 you. I'm concerned about, first of all,
8 timing, but I'm also concerned about the
9 breadth of the subpoena. It seems to be an
10 inordinate amount of material here that
11 you've requested.

12 MR. MOTLEY: Your Honor, I will
13 look at the subpoena. Here's what I really
14 want. I want these Gallahers -- I want the
15 documents that so exercise, Judge -- I'll
16 forego everything other than the documents
17 that have been produced, at least for the
18 purpose of this case, for the record, so I
19 don't have this thrown at me somewhere else.
20 For the purpose of this case, since we're in
21 trial, Your Honor, I will forego any of that
22 if they will produce to us right now, next
23 week, all of the documents. When I say
24 they, I mean American Tobacco Company, Brown
25 & Williamson. If they'll produce the
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1 documents that they produced pursuant to
2 this \$100,000 a day sanction. If they claim

3 they're privileged, then they'll produce
4 privilege logs; if they're not privileged,
5 then we want those documents produced to us.

6 I will forego taking Mr. Sheffler's
7 deposition in this case. I will meet him
8 another day somewhere. But I will forego
9 that, but, Judge, my main point here, Judge,
10 is please don't hold this September 1
11 deadline. These are documents that have
12 been in their possession. They know about
13 these documents. These are not documents
14 that we have.

15 So making us stand to a line, Your
16 Honor, with due respect -- and I understand
17 that there have got to be deadlines in this
18 case, but the nature of this case is, as you
19 know, this litigation is all over the
20 country. And why should we burden
21 Mr. Wiley, my firm, that's national counsel
22 to 40 states. We've been doing this
23 discovery in the state cases where we had
24 the support of the state government.

25 To make Mr. Wiley pay for or have costs
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1 incurred in this case of tens of millions of
2 dollars, which the record is clear has been
3 spent by discovery in these cases, to make
4 Mr. Wiley do that is nonsensical, Your
5 Honor, when you've got Rule 804(b) of your
6 Indiana rules that allows me to use the
7 depositions if there is a symmetry of
8 interest, identity of parties, and the same
9 motivation in this case. So why should we
10 run around and reinvent the wheel for
11 Mr. Wiley.

12 And I will be glad, Your Honor, in
13 light of your suggestion, to take a look at
14 that subpoena notice and narrow it down.

15 THE COURT: Mr. Wagner, did I see
16 you stand up there?

17 MR. WAGNER: I just wanted to
18 respond to Mr. Riley's statement that he
19 requested to take the deposition of CEOs
20 here. Mr. Riley requested that, and we told
21 him that it was irrelevant and immaterial to
22 take depositions of CEOs in this case. He
23 had a perfect right, of course, if he wanted
24 to, to subpoena them. That never happened,
25 and that was the long and the short of the

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1 entire matter, Your Honor.

2 When Mr. Riley represents to you that
3 we refused to do it or whatever, that is a,
4 shall I say, a misimpression that he should
5 be disabused of.

6 MR. RILEY: Your Honor, might I
7 respond to some of these things?

8 THE COURT: Perhaps. Let me ask
9 Mr. Motley again.

10 Mr. Motley, tell me again your
11 suggestion as to modification on your
12 attachment here to the subpoena.

13 MR. MOTLEY: Yes, Your Honor. I

14 would like for all the documents that have
15 been produced by Brown & Williamson-American
16 Tobacco Company pursuant to Judge
17 Fitzpatrick's orders after the first of this
18 year, pursuant to all of this going back and
19 forth between Chadbourne & Parke, Kirkland &
20 Ellis, the plaintiffs and the Court.

21 For example, Judge, you'll see a letter
22 in here from the plaintiffs' lawyer for the
23 State of Minnesota which bears a date of
24 February 6, 1998, wherein she says on page
25 2, Chadbourne & Parke admits -- now, that's

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1 who Mr. Sheffler is a partner in -- that it
2 has documents and document indices relating
3 to Gallahers Limited which have not been
4 produced to Minnesota. Exhibit 3, page 19,
5 20 to 23. And that's just one example,
6 Judge.

7 They have produced -- my understanding
8 is they produced something like 1,100
9 documents on the eve of trial that have been
10 under seal in Minnesota. They haven't been
11 released. Now, some of these documents have
12 just been released because they're being
13 used in the trial that's going on
14 simultaneously with this one. And I'll meet
15 up with Mr. Sheffler somewhere else if I can
16 get those documents for Mr. Wiley.

17 MR. OHLEMEYER: Very briefly, Your
18 Honor. This subpoena that Mr. Motley told
19 you about has been challenged in a New York
20 court. It's being litigated in New York.
21 Nothing is going to be resolved in that
22 situation before this case goes to the jury.

23 If you believe everything Mr. Motley
24 said, there is nothing that couldn't have
25 been brought to this Court's attention

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1 before the start of the trial, before the
2 pretrial in the case, before the end of the
3 year, or before the end of discovery with a
4 little more diligence on the part of the
5 lawyers. And I don't think we should delay
6 or protract this proceeding with a bunch of
7 collateral issues that are being litigated
8 in other courts.

9 MR. MOTLEY: If he won't produce
10 the documents, Your Honor, then I want
11 Mr. Sheffler here.

12 THE COURT: I'm not sure how long
13 this will really delay, if at all. The
14 motion to quash -- generally I'm going to
15 deny the motion to quash the subpoena. I am
16 going to follow Mr. Motley's suggestion.
17 The attachment will be modified as stated by
18 Mr. Motley, and I'll direct one of your
19 counsel to do that this afternoon,
20 Counselor.

21 The request that the discovery deadline
22 be extended, file that request in writing,
23 and I'll take a look at it over the weekend.

24 MR. MOTLEY: Thank you, Your Honor.

25 MR. OHLEMEYER: Am I correct, Your
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1 Honor, that I am permitted to assert any
2 appropriate objections to the discovery as
3 propounded?
4 THE COURT: Absolutely.
5 MR. OHLEMEYER: Thank you.
6 MR. MOTLEY: I would ask that the
7 time to do that, Judge, be shortened to a
8 day after I make the request, because they
9 know all about it.
10 MR. OHLEMEYER: That's fine.
11 MR. SHOCKLEY: A housekeeping
12 matter.
13 THE COURT: 24 hours, that's fair.
14 MR. SHOCKLEY: Housekeeping matter,
15 Your Honor, nothing to do with that issue.
16 THE COURT: Go ahead.
17 MR. SHOCKLEY: Give us a chance to
18 calm down here.
19 It's my understanding you're going to
20 show some depositions, video depositions?
21 THE COURT: Who's your next
22 witness?
23 MR. MOTLEY: Next witness is the
24 son, Gary Wiley.
25 THE COURT: And who is after that?
1550
1 MR. MOTLEY: Then, Your Honor, I
2 wish to show the deposition -- start, begin
3 the showing of the deposition of Mr. Frank,
4 Dr. Frank Colby, former senior researcher
5 for RJ Reynolds.
6 MR. WAGNER: Judge, just to give
7 the Court a little heads up, we have major
8 objections to that deposition, both
9 generally and specifically, that the Court
10 is going to have to take up out of the
11 presence of the jury, and I don't know
12 whether you want to bring them in, take them
13 out, or whatever the Court's desire is.
14 THE COURT: Do you have any other
15 witnesses in person for us today,
16 Mr. Motley?
17 MR. MOTLEY: Yes, Your Honor, we
18 could call -- we have Mr. Wiley and the
19 daughter, Carla, that we can call.
20 On this issue of depositions, Your
21 Honor, at some point in time you need to
22 give us about 20 minutes.
23 THE COURT: I understand.
24 MR. MOTLEY: If we do page and
25 lines like they want to do, they made 80
1551
1 objections. I mean, they object to
2 everything other than the guy's name.
3 So my suggestion would be that we show
4 the video, and if they want to object, if
5 they've got a really valid objection, let me
6 make it right here. We can stop the video
7 just like the witness was on the stand and
8 Your Honor can rule.
9 THE COURT: I'm not sure I'm going

10 to do that, Counselor. What I want to know
11 now is you have witnesses that are live
12 today?
13 MR. MOTLEY: Yes.
14 THE COURT: Just two?
15 MR. MOTLEY: Yes, sir.
16 THE COURT: Mr. LeBow, is he going
17 to testify today?
18 MR. MOTLEY: No, sir. We couldn't
19 assure him that he would get up. I believe
20 Your Honor told us yesterday you were going
21 to let the jury go earlier today.
22 In light of that, I couldn't assure him
23 he would get done today, so he will not be
24 here today. He will be here sometime next
25 week. He wants to be able to get up and off
1552
1 in one day. That's the problem.
2 THE COURT: All right. It might be
3 helpful sometime today to have one of the
4 attorneys for plaintiff, if you could jot
5 down the names and the expected day of their
6 testimony just for next week, and then we'll
7 do it every week after that.
8 MR. MOTLEY: Yes, sir, Your Honor,
9 we'll do that and provide that to Your Honor
10 or -- to Your Honor or them too?
11 THE COURT: Your side now. Just
12 for me but I'll show it to them.
13 MR. OHLEMEYER: Two quick things.
14 Am I correct that Mr. Sheffler is released
15 from the subpoena?
16 THE COURT: I did not quash the
17 subpoena, although Counsel this morning said
18 he was not going to require his presence on
19 Tuesday.
20 MR. MOTLEY: That's correct, Your
21 Honor. I'm going to redo the subpoena and
22 then give it to Your Honor this afternoon
23 and serve it on the defendants, and perhaps
24 we can revisit this on Tuesday. And if
25 they'll produce the same documents here,
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1 then I won't need to see Mr. Sheffler at
2 all. If they're not going to produce them,
3 then I want to see Mr. Sheffler at a time
4 that's convenient with him and satisfactory
5 with Your Honor and with those documents.
6 THE COURT: The answer that I can
7 tell from the return is Mr. Sheffler has
8 been served. I have not quashed his
9 subpoena, so he is still subject to the
10 subpoena. However, it's modified by me.
11 MR. OHLEMEYER: And he does not
12 need to be here Tuesday.
13 THE COURT: Exactly.
14 MR. OHLEMEYER: Second point:
15 Mr. Howard has a videotape that he wants to
16 play. It is along the same lines of the one
17 you've already seen. I would object to it
18 for all the same reasons. I assume Your
19 Honor is going to rule the same way,
20 although this one, I think, is a little more

21 objectionable because it really does focus
22 on the grandchildren, not even on Mrs.
23 Wiley's children.
24 So I think under the Rules of Evidence,
25 it's not relevant, it's unfairly

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1 prejudicial, its probative value is
2 outweighed by that prejudicial effect, and
3 the Court can and should exclude it.

4 THE COURT: What's it's marked,
5 Counsel?

6 MR. HOWARD: We have two of them.
7 Exhibit 18-9 would be introduced in Gary's,
8 along with 18-8 which Your Honor has already
9 ruled on. That is a two-minute video which
10 shows Gary --

11 THE COURT: 18-9 is a two-minute
12 video?

13 MR. HOWARD: Yes, and 18-10 is in
14 the daughter Carla's deposition or her
15 testimony, and that's two minutes and 30
16 seconds. We would propose to play 18-8 and
17 18-9 in Gary's testimony and have him just
18 narrate who is appearing without comment.

19 THE COURT: All right.

20 MR. SHOCKLEY: Judge, my request a
21 minute ago, we never really quite got to the
22 end of that, was, when we play these
23 depositions from other cases around the
24 country, obviously there are multiple
25 defendants in this case. All of these

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1 defendants were not defendants in those
2 cases.

3 Mr. Cross and I discussed this morning
4 a way in the future to anticipate and work
5 out in advance an agreement, if possible, as
6 to which parties defendant those depositions
7 may be admissible against because they
8 appeared in those cases and had an
9 opportunity to participate.

10 But there are going to be some of
11 these, and I think Colby is one of them,
12 where all of these defendants were not party
13 to the case in which Colby testified and
14 we're going to be requesting a limiting
15 instruction.

16 I don't know how you want to handle
17 that. But I just want to advise the Court
18 that that's a concern or whatever that's
19 going to repeat itself from time to time.

20 THE COURT: I thought that would be
21 the case. Thank you, Mr. Shockley.

22 All right. The objection to 18- --
23 I've ruled on 18-9.

24 MR. HOWARD: 18-9 and 10.

25 THE COURT: The objection to 18-9

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1 and 18-10, that objection will be overruled.
2 You need to offer those, Mr. Howard, when
3 the jury comes in, however.

4 MR. CASSELL: All rise.

5 (Jury present)

6 THE COURT: Be seated. The jury
7 present in its entirety, together with three
8 alternates. Our 15-minute conference turned
9 into 45. Sorry about that.

10 Mr. Howard, you may call the next
11 witness for the plaintiff.

12 MR. HOWARD: Plaintiffs would call
13 Gary Wiley.

14 THE COURT: Raise your right hand.
15 PLAINTIFFS' WITNESS, GARY LYNN WILEY, SWORN

16 DIRECT EXAMINATION

17 THE COURT: Have a seat. Tell this
18 jury your name.

19 THE WITNESS: Gary Lynn Wiley.

20 DIRECT EXAMINATION

21 BY MR. HOWARD:

22 Q Gary, could you tell the jury where you
23 live?

24 A I live in [DELETED].

25 Q And who lives there with you?

G. WILEY-DIRECT

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1 A I live there with my wife, Charlotte, and
2 three children.

3 Q And how long have you been married to
4 Charlotte?

5 A We have been married 19 years.

6 Q And what, sir, does she work with you or
7 what's her occupation?

8 A My profession, my wife is a registered
9 nurse, but we both serve as missionaries in
10 Peru.

11 Q And how old are your children, Gary?

12 A My oldest daughter, Christina, is 17; my
13 second daughter, Michelle, is 15; and we
14 have a son, Eric, who is 8.

15 Q How long have you been in Lima, Peru?

16 A We've been in Lima, Peru since 1988.

17 Q And what have you been doing there since
18 '88?

19 A Serving as missionaries with the Wesleyan
20 Church. I'm a church planter, that means
21 establishing new churches.

22 Q Could you explain to the jury a little bit
23 about your activities there? I mean, what
24 does a missionary do Sunday through Sunday,
25 or whatever?

G. WILEY-DIRECT

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1 A Well, Sunday, people think pastors' work on
2 Sunday, but I'm quite busy throughout the
3 week. As a missionary in Lima, Peru, I'm
4 responsible for the day-to-day activity, the
5 ministry of the church where I'm working.
6 I'm also responsible for theological
7 education, and I'm always available for
8 counseling, for helping the national pastors
9 to do their work as well.

10 Q How is your wife involved in your
11 activities?

12 A My wife is not -- does not actively practice
13 her nursing, because we do not have the
14 medical ward in Peru, but she is involved in

15 children's ministries and women's
16 ministries.
17 Q What year were you born, Gary?
18 A I was born in 1956.
19 Q And where were you born?
20 A I was born in Mattoon, Illinois.
21 Q And your mother and father's name?
22 A My father's name is Philip Wiley, my
23 mother's name, Mildred Wiley.
24 Q And do you have a sister?
25 A I have one sister.

G. WILEY-DIRECT

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1 Q What's her name?
2 A Her name is Carla Wiley Addington.
3 Q And what's the difference between your age
4 and Carla's age?
5 A I'm two years older than my sister.
6 Q Now, after you were born in Mattoon, I'd
7 like for you just to kind of take the jury
8 through -- that was in '56, you said?
9 A That's correct.
10 Q If you could, and I may stop you
11 occasionally, take the jury through where
12 you lived and your schooling up until 1963.
13 A Okay. As I stated, I was born in 1956 in
14 Mattoon, Illinois. My parents were living
15 in Janesville, Illinois, at the time. I am
16 not sure exactly, but months later my
17 parents moved to Frankfort, Indiana, and
18 were there for a period of time until my
19 sister was born in 1958.
20 I don't know my sister's birth, and I
21 can't tell you exactly the year, but my
22 family moved to Oregon and lived in Svenson,
23 Oregon, and then following that in Eugene,
24 Oregon. And I attended kindergarten in the
25 city of Eugene, Oregon.

G. WILEY-DIRECT

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1 At the end of that time or during that
2 year my grandfather passed away and the
3 family, to be close to my Grandmother Wiley,
4 my father's mother, we moved back to
5 Yorktown, Indiana, nearby, and I attended my
6 first half of first grade in Yorktown
7 schools. And my father then accepted a
8 pastorate in Clinton, Pennsylvania, and we
9 were there, I finished my second half of my
10 first grade year, and we were there until my
11 parents accepted a call to serve as
12 missionaries in 1963.
13 Q Do you recall when your family left, when
14 you left the states you were, what, seven
15 years old?
16 A I was six, turned seven that fall.
17 Q Was that something you have vivid memories
18 of?
19 A Yes, I do. I have quite vivid memories of
20 that experience.
21 Q And at that time, what -- you were living in
22 [DELETED]?
23 A Before we left the states for Suriname.

24 Q Did you live in a home in [DELETED]?
25 A It was a parsonage that belonged to the
G. WILEY-DIRECT

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1 church.
2 Q What all, if you recall, did you take with
3 you when you went to the -- was it Suriname?
4 A Yes. To the best of my recollection, we
5 sold all of our furniture because that was
6 impossible to take, but my parents packed
7 most of our belongings, clothes and things
8 that we would need in barrels and they were
9 shipped.
10 Q So your automobile?
11 A That was sold.
12 Q Now, the jury has heard about Suriname.
13 First of all, describe the house that you
14 lived in in Suriname.
15 A We lived in a house that was built up on
16 stilts. I don't mean -- stilts probably is
17 the wrong term. More like large trunks, to
18 keep it above the ground.
19 Q Like how high?
20 A Maybe three feet off the ground.
21 Q Okay.
22 A We had a four-bedroom home, the four
23 bedrooms were at one end and there was an
24 office, living room, dining room, kitchen
25 and then a storage area off the kitchen.

G. WILEY-DIRECT

1562

1 Q Did you have running water?
2 A No.
3 Q Did you have outdoor plumbing?
4 A Well, yes, I guess that's what you would
5 call it.
6 Q Do you have a memory as to how far the
7 outdoor plumbing was from the home?
8 A It was quite a distance from the house. Of
9 course, the concern of the smell and that
10 sort of thing. It was quite a distance.
11 Q And where did you get your water?
12 A We collected -- we had a large cistern and
13 rainwater was collected in that. It was
14 filtered several times, and then other
15 filtering techniques were used in the
16 kitchen and I believe even boiling.
17 Q What did your father do there?
18 A Well, my father was a missionary there, and
19 his main responsibility was running the
20 compound. It was a compound, a large
21 compound, over 100 acres, and there was a
22 dorm, day school and two dorms, one for
23 girls and one for boys, people from that
24 area who attended the school and lived
25 there. So he was responsible for them, also

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1 for the church there, and his desire was to
2 make the, that compound self-sufficient
3 through agricultural means.
4 Q What did you do as a child there? I think
5 you were, what, seven when you get there?

6 A Just soon after we arrived I turned seven,
7 yes.
8 Q And what did you do? Did you go to school
9 or help with the mission?
10 A I did what I could as a child, but most of
11 my time I'm sure I spent playing with my
12 friends. I also attended school there and
13 my mother was our teacher. She was, as you
14 know, a registered nurse by trade, but she,
15 for four years, was our schoolteacher as
16 well.
17 Q Were just you and Carla the only students
18 she had?
19 A It was a two-student school, yes.
20 Q Was your schooling ever interrupted during
21 the day?
22 A Yes, quite frequently.
23 Q And what was the cause of that?
24 A Generally a knock at the door for various
25 reasons. People needing things.

G. WILEY-DIRECT

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1 Q The interruptions were quite frequent?
2 A Yes, they were quite frequent.
3 Q Do you recall ever making a survey of how
4 many knocks there were at the door?
5 A I don't -- I do remember that I did that at
6 one time, yes.
7 Q But you don't remember the numbers?
8 A No, no.
9 Q Okay. And I think you said you were in
10 school there four years, but you were there
11 five years?
12 A Yes. The last year that we were in
13 Suriname, my mother, as observing me and my
14 need to compete and being, I humbly say, an
15 above-average student, felt it was necessary
16 for me to have an opportunity to be with
17 other children in a classroom, and there was
18 an opportunity for me to attend a boarding
19 school in the capitol city.
20 Q What was the purpose of the boarding school?
21 Did Carla go too?
22 A She accompanied me. She wanted to be where
23 her big brother was.
24 Q Did you know you were going back to the
25 states that year?

G. WILEY-DIRECT

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1 A Yes. That was the main reason. Knowing
2 that we were headed back to the United
3 States, my parents felt it was important
4 that I have a little exposure to what a
5 classroom situation was to prepare me
6 because I was going to be going into the
7 seventh grade in the states.
8 Q Do you recall that as a good time, and
9 Suriname a good time in your childhood life?
10 A It was a tremendous time for me, yes.
11 Q So then you came back to the states with
12 your mom and dad in what year?
13 A We returned to the states in July of 1968.
14 Q And where did you move to then?

15 A We began to live in Frankfort, Indiana.
16 Q And who did you live with or where did you
17 live there? Was it a home?
18 A There was a mission home that our
19 denomination maintained at that time in the
20 city of Frankfort, and there were, I think,
21 about four families that lived in the large
22 house, apartment-style.
23 Q Do you recall what your father did then?
24 A My father was still, of course, employed
25 with the mission, and one of the

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1 responsibilities at that time was to visit
2 churches that had been supporting us and
3 praying for us, and that necessitated
4 weekend visits to churches in surrounding
5 areas.
6 Q Did he sometimes go away and have to be away
7 overnight without the family?
8 A There were times when he would have to go
9 away overnight, yes.
10 Q Did you ever go away overnight with him or
11 he would take the family?
12 A There were times when the family would
13 accompany him.
14 Q So this gets you up to what, 1969?
15 A That is correct.
16 Q And how old are you then?
17 A I am 13.
18 Q What grade of school are you in?
19 A I'm going into the 8th grade.
20 Q And were there plans to go back to Suriname?
21 A Yes, there were. Not to Suriname. Excuse
22 me. Plans to continue our mission service,
23 but not in Suriname.
24 Q What?
25 A We were planning to go to the country of

G. WILEY-DIRECT

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1 Guyana.
2 Q Did you eventually go to Guyana?
3 A No. We had made all the plans to do so, in
4 fact, had packed the belongings that we had
5 in barrels and had sent them on ahead, but
6 we were unable to get a visa to return or to
7 go to Guyana.
8 Q Was there a reason for that?
9 A I suppose a couple of reasons. One, the
10 Suriname and Guyana had not been on the best
11 of terms, and because of our being in
12 Suriname, it caused some question in Guyana,
13 and also there was not a government in
14 Guyana that was favorable to the American
15 government.
16 Q So your clothing and those goods had been
17 shipped to Guyana, but you can't go?
18 A Yes, they had been shipped.
19 Q At this time where had your mother been
20 working during this year's period?
21 A During the time that we were in Frankfort,
22 my mother worked at Clinton County Hospital.
23 Q And then when you found out that you

24 couldn't go to Guyana, did you stay there in
25 Frankfort?

G. WILEY-DIRECT

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1 A No. When we realized we would not be able
2 to go to Guyana, my parents terminated their
3 service with Wesleyan World Missions and we
4 moved to Marion, Indiana.

5 Q Did your father take a job?

6 A Yes, he did.

7 Q And what do you recall about that job?

8 A Well, I recall that he worked for Wesley
9 Press at quite a low wage, I remember at the
10 time.

11 Q And your mother, did she take a job?

12 A She was able to get a job at the Davis
13 Clinic, yes.

14 Q Then when you went to Marion, where did you
15 go to school?

16 A I completed my eight grade year in the
17 McCullough Junior High School in Marion.

18 Q Then how long did your mother continue to
19 work at Davis Clinic, if you recall?

20 A Well, she would have started in 1969, and I
21 believe she worked there continuously until
22 1973.

23 Q And then in 1973 you were in what year of
24 school?

25 A I was getting ready to start my senior year

G. WILEY-DIRECT

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1 of high school.

2 Q And when your mother went to work at the VA
3 Hospital, do you recall ever going there,
4 Gary?

5 A Yes, I went there occasionally.

6 Q And during what period of time, let's start
7 with when she was, started there in '73, how
8 long did you stay in Marion until you left?

9 A Right. I was in my senior year of high
10 school, as I mentioned. 1974 I graduated,
11 and I went to Bartlesville Wesleyan College
12 in Bartlesville, Oklahoma, in my first two
13 years of college, and I would have been back
14 home in the summertime.

15 Q Approximately how many times, if you can
16 tell, can recall, did you go to the VA
17 Hospital to see your mother?

18 A To see her, I would say probably around five
19 times.

20 Q Can you describe for the jury a little --
21 just an idea of where your mother worked
22 within that VA Hospital. Let's just take
23 them down, go in the front door and what do
24 you see and go on back to where you see your
25 mother.

G. WILEY-DIRECT

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1 A You're speaking of the actual building?

2 MR. WAGNER: Excuse me, Judge, I
3 don't think there is any foundation laid
4 that this witness can describe every place
5 that his mother worked in the hospital. He

6 said he visited there five times in all the
7 years she worked there for 17 years.
8 MR. HOWARD: I'll lay some
9 foundation.
10 THE COURT: Go ahead.
11 Q Gary, was there normally a place when you
12 would go there that you would see your
13 mother?
14 A Normally, yes, at the nurses' station.
15 Q And where is the nurses' station within that
16 building? Can you describe the building and
17 where that is?
18 A As you would enter into the building, you
19 would go down a hall. There were rooms
20 along the side of that hallway, and the
21 nurses' station was on the left-hand side of
22 that building in the center of the building.
23 Q And then do you know if there was a day
24 room?
25 A Well, I understand the day room -- an area
G. WILEY-DIRECT

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1 with kind of a lounge?
2 Q Yes.
3 A Yes, there was.
4 Q And where was that in proximity to where
5 your mother was?
6 A It would be directly across from the nurses'
7 station on the right-hand side.
8 Q And where, Gary, when you say the nurse's
9 station, can you describe that? Is that an
10 enclosed room?
11 A No. It would be much like a hotel desk
12 where you just have kind of a desk with
13 people on the other side.
14 Q Did that look out into the day room?
15 A Yes, it did.
16 Q So it was directly across from there.
17 On those occasions when you would go to
18 the VA Hospital to see your mother, did you
19 notice anything about smoke in the area?
20 A Yes, I did.
21 Q And could you describe that for the jury,
22 what you recall about smoke in that area.
23 A Well, in the, that lounge day room as you
24 call it, there were patients there. And
25 they were generally most of them smoking.

G. WILEY-DIRECT

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1 Q And Gary, had you ever -- have you ever
2 smoked?
3 A No, I have never smoked.
4 Q Is there a reason that you didn't smoke?
5 A Well, I never saw it as an example in my
6 home, I never had a desire to smoke. No.
7 Never wanted to.
8 Q Does it have anything to do with any
9 religious convictions?
10 A That, it does, yes.
11 Q Can you tell the jury about those
12 convictions?
13 MR. WAGNER: I don't think that's
14 particularly relevant.

15 THE COURT: His convictions?
16 MR. WAGNER: That's what he's
17 asking.

18 THE COURT: Sustained.

19 Q Gary, what's your religious faith? What
20 church do you belong to?

21 A I'm a member of the Wesleyan Church.

22 Q Was your mother a member of the Wesleyan
23 Church?

24 A Yes, she was.

25 Q Were you brought up in a Wesleyan Church?

G. WILEY-DIRECT

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1 A From when I was born, yes.

2 Q The religious principles and convictions
3 that you hold, were some of those conveyed
4 to you by your mother?

5 A I would say they all were.

6 Q Would you say that your convictions are
7 basically the same as your mother, in your
8 opinion?

9 A I don't think there is any difference, no.

10 Q And what do you -- your convictions as to
11 the smoking, what are those convictions?

12 MR. WAGNER: Your Honor, they're
13 irrelevant, again, as to what his
14 convictions are.

15 THE COURT: Sustained.

16 Q Gary, when your mother would come home from
17 work, would you ever be there?

18 A During the time that I lived at home, yes.

19 Q And did you ever observe anything, any odor
20 that she would have when she would come
21 home?

22 A Yes. Yes, I did.

23 Q And could you tell the jury about that?

24 A She came home smelling like smoke.

25 Q Was that talked about in your family?

G. WILEY-DIRECT

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1 A Yes, it was.

2 Q And was it mentioned from time to time by
3 you to your mother?

4 A It was one of those things, that mom usually
5 wanted to get rid of all the smokey clothes
6 before she associated with the family, yes.

7 Q Let's go on, Gary, about the -- you
8 graduated from high school and then where
9 did you go?

10 A When I graduated from high school in 1974, I
11 went to Bartlesville.

12 Q Where is that?

13 A Bartlesville, Oklahoma.

14 Q Is it, what kind of a college is it? I
15 guess that's what I meant to say.

16 A Bartlesville Wesleyan College is a liberal
17 arts Christian college.

18 Q Had you worked anyplace up to this time?
19 Had you held a job, Gary?

20 A Before going to college, I had worked with
21 my dad laying carpet, but that was all.

22 Q And you went out there for two years, so you
23 were away from home?

24 A Except for the summer, between my summer and
25 freshman year, I was away from home, yes.

G. WILEY-DIRECT

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1 Q When you came back during that summer, would
2 that have been one of the times you would
3 have been in the hospital, perhaps?

4 A It could be.

5 MR. WAGNER: Leading and
6 suggestive, Your Honor.

7 THE COURT: That was leading.

8 Q Did you go to the hospital during your
9 summer year, your summer that you came home
10 from the two years in Bartlesville?

11 A It's very possible that I did, yes.

12 Q So you're home for the summer and then where
13 do you go?

14 A Well, after my freshman year, the summer of
15 my freshman year, I went back to
16 Bartlesville and finished my sophomore year.

17 Q After you finished your sophomore year?

18 A I came back to Marion, Indiana, and stayed
19 there.

20 Q And did you take a job or go to school?

21 A During that summer I worked in a restaurant.

22 Q And what was the name of the restaurant?

23 A Crossroads Restaurant.

24 Q And what kind of restaurant was that?

25 A It was a family restaurant.

G. WILEY-DIRECT

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1 Q Was there smoking in that restaurant?

2 A Yes, sir, there was.

3 Q Then where did you -- how long did you go to
4 school at Wesleyan University there?

5 A I finished my two years and graduated from
6 there.

7 Q What kind of a degree did you receive?

8 A Bachelor of science in history and social
9 studies.

10 Q Then where did you go?

11 A I stayed right in Marion. I married my wife
12 following graduation. We remained there in
13 Marion for two more years.

14 Q Where did your wife go to nursing school?

15 A She graduated from Indiana Wesleyan
16 University in Marion.

17 Q So then you moved away from Marion?

18 A Following her graduation, we moved to
19 Lexington, Kentucky.

20 Q Gary, up to the time that you got married
21 with the exception of two years that you
22 were in Bartlesville, you basically lived
23 all that time with your mother and father?

24 A Yes, until I married.

25 Q Let's talk, first of all, about the meals or

G. WILEY-DIRECT

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1 the cooking that your mother would do. What
2 kind of a diet did you have growing up as a
3 child?

4 A I would typically -- I would say it was a
5 typically healthy diet. There were times

6 that we wanted maybe more dessert but we
7 basically had a one-time-a-week dessert rule
8 in our family.
9 Q Did you eat out much?
10 A No, we did not.
11 Q Roughly how many times a year would you eat
12 out, Gary? Let's say up to the time you
13 were through high school.
14 A Except for perhaps on a vacation time, we
15 would normally, if you could call it eating
16 out, once a week.
17 Q When you were there in Marion -- and I
18 forgot to ask you this, do you recall the
19 places you lived in Marion?
20 A Yes.
21 Q Tell me about those.
22 A Yes. The first year we lived in Marion, we
23 lived on South Miller Avenue in a trailer
24 park. And then following that we moved to
25 Sicily's Trailer Park in South Marion near
G. WILEY-DIRECT

1578

1 Jonesboro.
2 Q Tell the jury a little bit about what the
3 family life was like from the standpoint of
4 entertainment.
5 A Well, entertainment was basically what we
6 did as a family playing games, maybe
7 watching television.
8 Q Didn't go to a lot of movies?
9 A No, we never went to movies.
10 Q Did you take vacation trips?
11 A Generally we would take one vacation a year.
12 Q Were you aware at that time as to who was
13 making the most money, your mom or your dad?
14 A We were aware of it, yes.
15 Q And what was that situation?
16 A Mom as a nurse was making a higher salary
17 than my father was.
18 Q While you were growing up, did you ever know
19 if your mother worked Sundays?
20 A Yes, she did.
21 Q In fact, you work Sundays, don't you?
22 A I do, yes. Some people say it's the only
23 day I work.
24 Q What about your mother's parents on your
25 mother's side, your mother's parents; did
G. WILEY-DIRECT

1579

1 you know both your grandmother and your
2 grandfather were living?
3 A Yes. Yes.
4 Q Do you recall when your grandfather passed
5 away?
6 A My grandfather passed away in 1978.
7 Q And how old was he?
8 A He was 74.
9 Q And your grandmother?
10 A My grandmother passed away in 1994.
11 Q Do you know how old was she?
12 A She was 92.
13 Q How about your great-grandparents, Gary?
14 A On my mother's side -- I've done a little

15 research on my family, kind of a hobby. All
16 my grandparents, great-grandparents, I
17 should say, lived long lives.
18 Q Do you know anything about ages of your
19 great-grandparents or great-grandmother?
20 A Would range between 76 and 90.
21 Q Could you describe for the jury as a mother
22 some of the traits that you saw in your
23 mother? Not as a person, but as your
24 mother.
25 A As a mother. Yes, a variety of things come
G. WILEY-DIRECT

1580

1 to my mind. She was someone who expected me
2 to obey her, but in a loving way. She was a
3 support. As I grew up, she became a
4 cheerleader on my behalf. Always somebody
5 who I could talk with.
6 Q And what did you observe about your mother
7 as a person, as she related to other people
8 that were around her outside the family?
9 A One of the things I've always said about my
10 mother was she was very consistent. That
11 she had a favorite saying: Consistency,
12 thou art a jewel. That meant to me whatever
13 she said she did.
14 Q You went away to, I think, Kentucky, and how
15 long were you in Kentucky?
16 A We were in Kentucky for three years.
17 Q And that takes us up to what time?
18 A Until 1983.
19 Q And then in 1983 where did you move to?
20 A We moved to Middleville, Michigan.
21 Q And when you were in Kentucky, did you have
22 contact with your mother and father?
23 A Yes, we did. We would -- I was in --
24 studying for my masters, and so we would
25 occasionally go up to visit them. They
G. WILEY-DIRECT

1581

1 would visit us, but we always had contact
2 through mail and telephone.
3 Q Mail. Did you get letters from home?
4 A Yes, we did.
5 Q And who did those letters come from?
6 A Always from Mom.
7 Q And then when you went to Michigan, did that
8 pattern continue?
9 A Yes, it did.
10 Q And how long did you live in Michigan?
11 A We lived there four years.
12 Q And that gets us up to what, 19- --
13 A 1987.
14 Q 1987. And what happened in 1987?
15 A In 1987 we were accepted for service with
16 Wesleyan World Missions to go to Peru.
17 Q Did you sell all your belongings?
18 A Yes, we did.
19 Q And you went to Lima, Peru?
20 A Well, we went to Costa Rica first.
21 Q Okay. Why did you go to Costa Rica?
22 A To learn Spanish.
23 Q And do you speak Spanish when you minister

24 down there?
25 A Yes, I do.

G. WILEY-DIRECT

1582

1 Q In fact, do you sometimes speak Spanish when
2 you don't intend to?
3 A Yes, I do.
4 Q After you got down to Costa Rica, did you
5 see your parents after you got there?
6 A Yes.
7 Q And when would that have been?
8 A My parents visited us in the spring of 1988.
9 Q At that time, Gary, as you think back, did
10 your mother appear to be in good health?
11 A Yes, she did. She did. She was in good
12 health.
13 Q Throughout the time you were growing up, did
14 you ever know of your mother having any
15 serious health problems?
16 A No. I was not aware of any serious health
17 problems.
18 Q To the best of your knowledge, did your
19 mother ever smoke?
20 A My mother, as far as I know, never smoked in
21 her life.
22 Q After you left Costa Rica, where did you go?
23 A In the fall or the summer of 1988, we went
24 to Lima, Peru.
25 Q And did you see your parents there?

G. WILEY-DIRECT

1583

1 A Yes.
2 Q When did you first see your parents?
3 A My parents came to visit us in the spring of
4 1989.
5 Q And did your mother appear to be in good
6 health?
7 A Yes, she did.
8 Q About how long were they there, do you
9 recall?
10 A They were there with us about ten days to
11 two weeks. I can't exactly say.
12 Q And when is the next time you saw your
13 mother and father?
14 A The next time I would have seen my parents
15 would have been in March of 1990, I came
16 back to the United States.
17 Q Did you come alone or did you bring
18 Charlotte and the children?
19 A I came alone.
20 Q And why did you come back for that three
21 weeks?
22 A I was required to come back for a three-week
23 conference of mission directors from all
24 over the world.
25 Q And where did you stay during that

G. WILEY-DIRECT

1584

1 three-week period?
2 A During that three-week period I stayed in my
3 parents' home.
4 Q And did your mother appear to be in good
5 health at that time?

6 A Yes, she did.
7 Q And that was in March of 19- --
8 A 1990.
9 Q 1990. Then you went back to Lima, Peru?
10 A Yes, I did.
11 Q And when is the next time you saw your
12 mother?
13 A July of 1990.
14 Q And where did you see her?
15 A My parents came once again to visit us in
16 Lima.
17 Q Did her health appear good at that time, or
18 how was her health?
19 A Health was good. Mom occasionally suffered
20 from constipation from traveling, but other
21 than that, she was always fine.
22 Q Was that something that was kind of known in
23 the family that any time mom traveled --
24 A Yes, it was kind of a family joke.
25 Q Then do you recall how long they were there?

G. WILEY-DIRECT

1585

1 A I believe they were, again, ten days to two
2 weeks visiting us.
3 Q When is the next time you saw your mother?
4 A The next time would have been in January of
5 1991.
6 Q And where did you see her?
7 A As a family we came back to the United
8 States.
9 Q Where did you live when you came back?
10 A We lived in Gas City, Indiana.
11 Q Is that close to Marion?
12 A It's close to Marion. It's close to
13 Jonesboro where my parents lived. Twin city
14 of Jonesboro.
15 Q Why did you come back to the United States?
16 A Well, we -- our mission brings us back every
17 so often, often to do what we call home
18 ministries, and we were coming back for just
19 a short period of time to do a short period
20 of home ministries for a period of three and
21 a half months.
22 Q And did you see your mother on a regular --
23 how often would you see your mom during that
24 three and a half months?
25 A I would estimate anywhere from three to five

G. WILEY-DIRECT

1586

1 times a week.
2 Q And this was in, starting when, Gary?
3 A January 15th, around about that time, 1991.
4 The Gulf War just had begun.
5 Q Did you notice any change in your mother's
6 health at that time, Gary?
7 A I didn't notice anything initially.
8 Q Did that change later?
9 A Yes, it did.
10 Q What, if anything, did you notice?
11 A My mother began to cough, and that cough
12 grew more persistent.
13 Q Was there conversation about that?
14 A Not initially, but later, yes.

15 Q Did you say things to your mother about her
16 cough?
17 A I expressed concern.
18 Q Did you know of a reason for her cough?
19 A No, I did not know a reason.
20 Q When did you go back to Lima, Peru?
21 A As a family, we returned at the end of April
22 of 1991.
23 Q And then when is the next time you saw your
24 mother?
25 A Very end of May 1991.

G. WILEY-DIRECT

1587

1 Q Did you get a call or why did you come home
2 at that time?
3 A Yes, I did.
4 Q Did you get a call?
5 A I got a call from my sister telling me that
6 my mother was in the hospital.
7 Q Did you know any more about it than that?
8 A I knew that my mother had gone into the
9 hospital for back surgery and my sister
10 called me to say that she had cancer.
11 Q Do you recall what day that was?
12 A I can't tell you exactly. It was around the
13 29th, 30th, 31st of May, that vicinity.
14 Q How long of a flight is it from Lima to
15 Indiana?
16 A It takes normally 12 hours.
17 Q Do you recall that flight, Gary?
18 A I sure do.
19 Q Can you tell the jury a little bit about
20 that flight.
21 A Well, it was a flight, of course, an
22 all-night flight, and just a difficult time
23 not wanting to believe what I had heard, and
24 pleading with God that it couldn't be true.
25 Q When you got to Indianapolis, where did you

G. WILEY-DIRECT

1588

1 go?
2 A I was met by my father at the Indianapolis
3 Airport and we went directly to Ball
4 Memorial Hospital.
5 Q And what day, again, Gary, was this?
6 A I would put it around the 31st of May. I
7 can't exactly be sure.
8 Q And for the next few weeks did you spend a
9 lot of time at Ball Memorial Hospital?
10 A The next three weeks I was at the hospital
11 every day.
12 Q And had Carla come then too, Gary?
13 A She was already there, yes.
14 Q What did you observe about your mother's
15 condition when you got there, Gary?
16 A I saw a tremendous change in my mother from
17 the month that I had not seen her, and she
18 was in a lot of pain.
19 Q Did you do some things for her to help her
20 while she was there in the hospital?
21 A Did everything I could. Tried to encourage
22 her and it came a point where she didn't
23 want to be left alone at night, and I spent

24 the bulk of that time with her at night,
25 spending the night there in her hospital

G. WILEY-DIRECT

1589

1 room.
2 Q Do you know if she received any radiation
3 treatment?
4 A Yes, she did. Yes, she did.
5 Q Who took her to radiation?
6 A I always accompanied her to radiation.
7 Q What did you observe about her mental
8 condition as far as the pain?
9 A She was in tremendous pain. It was
10 difficult just to even move. She was -- she
11 had a special bed, air bed, and every
12 movement was a pain -- was painful.
13 Q And were you with her the last few days?
14 A Yes, I was.
15 Q And did she pass away on June 24th, 1991?
16 A At 6:00 in the morning, yes.
17 Q Gary, at the time that your mother died, did
18 you know what kind of cancer she had? Were
19 you told?

20 MR. WAGNER: Your Honor, excuse me,
21 if this is going to call for a medical
22 opinion, I have to object.

23 Q Were you told what kind of cancer your
24 mother had?

25 MR. WAGNER: That would be hearsay,
G. WILEY-DIRECT

1590

1 Your Honor.
2 THE COURT: He can answer that yes
3 or no.

4 A I was told, yes.

5 Q And who told you?

6 MR. WAGNER: And that would be
7 hearsay, Your Honor. Well, who told him, if
8 he limits his answer to who told him, I have
9 no problem.

10 THE COURT: Just tell us who told
11 you.

12 A My father told me.

13 Q Were you ever involved in a conversation
14 about an autopsy on your mother?

15 A Yes, I was.

16 Q Do you recall when that would have been,
17 Gary?

18 A It would have been the day of my mother's
19 death, yes.

20 Q And who else was there when you were
21 talking?

22 A My father and my sister.

23 Q Was that a family decision?

24 A Yes, it was.

25 Q Gary, did you want to know the cause of your

G. WILEY-DIRECT

1591

1 mother's death?

2 A Yes, I did.

3 Q And later, Gary, did you have a conversation
4 with your father about filing a lawsuit?

5 A He talked to me about it, yes.

6 Q Did he tell you why he wanted to file a
7 lawsuit?
8 MR. WAGNER: Excuse me, Your Honor.
9 This would be irrelevant and it's hearsay.
10 THE COURT: I'm not sure it's
11 relevant, Counselor. The objection is
12 sustained.
13 MR. HOWARD: Your Honor, we would
14 offer into evidence and ask that Plaintiffs'
15 Exhibit 8 and Plaintiffs' Exhibit -- I'm
16 sorry, 18-8 and Plaintiffs' Exhibit 18-9,
17 being two videos, and ask permission of the
18 Court to play these and to have the witness
19 step down and narrate the videos just as to
20 who appears in the videos.
21 THE COURT: All right. Counsel had
22 an opportunity to review those?
23 MR. OHLEMEYER: We have. For the
24 objections previously stated, Your Honor.
25 THE COURT: Right. Objection is
G. WILEY-DIRECT

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1 noted and overruled. 18-8, 18-9 will be
2 admitted.
3 (Plaintiffs' Exhibit(s) 18-8, 18-9
4 received in evidence.)
5 THE COURT: Witness may step down.
6 You can play the videos, Counselor.
7 (Video playing)
8 A This is my mother and my sister and myself.
9 My father.
10 THE COURT: Mr. Wiley, you're going
11 to have to speak up just a little bit.
12 A I'm sorry. This is my father with my sister
13 and myself and my mother. My father.
14 That's my sister. My mother's graduation
15 class. Nursing class. And her capping
16 picture. My mother's father and again my
17 mother. My father's mother and father, aunt
18 and uncle. This is my mother's mother.
19 These are some friends of the family.
20 My mother at the VA Hospital with some
21 of her co-workers. My mother with one of
22 her awards.
23 This is my mother with my cousin's
24 wife. My mother with my sister and her two
25 boys. My mother and my sister. And her son
G. WILEY-DIRECT

1593

1 Wesley.
2 Again my mother and my father.
3 This is my mother here. My mother with
4 her two grandsons, Jonah and Wesley.
5 This is my mother's funeral.
6 Q That was 18-8. Could we have 18-9 now.
7 A This is my mother, myself, and my wife,
8 Charlotte. My daughters Christina and
9 Michelle. My daughter Christina. My
10 mother.
11 This is our family, my daughters
12 Christina and Michelle. My wife, Charlotte,
13 and my mother, myself.
14 Some of our neighbors in Peru with my

15 mother. A family picture.
16 Q Gary, just a couple of questions. To the
17 best of your knowledge, your mother, except
18 for the four years at Davis Clinic, always
19 worked at the hospitals?
20 A Yes.
21 Q Did you ever work in a hospital?
22 A Yes, I did.
23 Q And where was that?
24 A University of Kentucky Medical Center in
25 Lexington, Kentucky.

G. WILEY-DIRECT

1594

1 Q And what years was that?
2 A That would have been 1981 and '82.
3 Q Did you observe if there was smoking in that
4 hospital?
5 MR. WAGNER: I'll object, Your
6 Honor. This is irrelevant immaterial.
7 THE COURT: Sustained.
8 MR. MOTLEY: May I confer with
9 Mr. Howard?
10 Q Gary, the conversation you had about the
11 lawsuit, do you know, with your father, do
12 you know when that would have been?
13 A I could not place it an exact date on that.
14 No. It would have been after, of course
15 after my mother's death and it would have
16 been before 1995 when I was flown home for a
17 deposition.
18 Q But it wasn't immediately after your
19 mother's death?
20 A No, it was not.
21 Q Do you have any idea in months or years?
22 A I would say maybe a couple of years.
23 MR. HOWARD: No further questions.
24 Thank you.

25 THE COURT: Mr. Wagner, any
G. WILEY-DIRECT

1595

1 questions?
2 MR. WAGNER: I'll be very brief, I
3 think, Your Honor.
4 THE COURT: All right.

5 CROSS-EXAMINATION

6 BY MR. WAGNER:

7 Q Good afternoon, Mr. Wiley. My name is
8 Richard. We haven't met before, have we?
9 A I don't believe so, no.
10 Q My name is Richard Wagner, I'm one of the
11 attorneys in this case for RJ Reynolds
12 Tobacco Company and another defendant and I
13 just want to ask you a few questions.
14 A Okay.
15 Q Seeing those videos sort of reminds all of
16 us that time goes by; right?
17 A Yes, they sure do.
18 Q And we change; right?
19 A Yes, we do.
20 Q You described some things about your mother,
21 and would you say that your mother was a
22 person who, as a nurse, was professionally
23 oriented?

24 A By professionally oriented, I'm not sure I
25 know what you mean by professionally
G. WILEY-CROSS
1596
1 oriented.
2 Q In terms of her job as a nurse and her
3 profession as a nurse, that she took a great
4 interest in it and did reading and that sort
5 of thing.
6 A I'm not aware of how much reading she did,
7 no. I do not know that.
8 Q You describe your mother as an intelligent
9 person; correct?
10 A Yes, I believe she was intelligent.
11 Q And you described your mother as a decisive
12 person; would that be correct?
13 A That would be correct.
14 Q You ceased living with your parents in 1978;
15 isn't that so?
16 A That is correct.
17 Q And I'm going to skip through my notes here
18 for a minute because a lot of things here
19 have already been covered.
20 And I'm looking at my notes from your
21 deposition. You do remember you were
22 deposed in this case?
23 A Yes, I was.
24 Q And I think you told us that when you were
25 growing up, your parents generally
G. WILEY-CROSS

1597
1 subscribed to the Marion Chronicle Tribune;
2 was that the newspaper?
3 A Yes, it was.
4 Q And your mother or your parents, at least,
5 received the Reader's Digest?
6 A At least for one year I know they did.
7 Q And that's because you and your sister
8 subscribed for them; is that right?
9 A That is correct.
10 Q You said that you visited your mother in the
11 hospital no more than about five times the
12 entire time that she worked there, as I
13 recall Mr. Howard asking you.
14 You don't recall ever visiting your
15 mother at the VA Hospital after 1978?
16 A I don't have a recollection of that visit
17 then, no.
18 Q Do you remember telling us that your visits
19 there never lasted more than about five
20 minutes?
21 A Usually it was in and out, yes.
22 Q Mr. Howard asked you about your
23 participation in the decision to have an
24 autopsy done after your mother passed away.
25 Do you recall that?
G. WILEY-CROSS

1598
1 A Yes, I do.
2 Q And isn't it a fact that it was Dr. Turner
3 who requested permission to do the autopsy?
4 A In my deposition I believe I mentioned that,
5 but as I recollect in that same deposition

6 that I was not really sure where that came
7 from. I was part of a decision as to
8 whether to do it or not, and to what extent.
9 Q But you do remember that when you were
10 deposed in this case, you told us that it
11 was Dr. Turner who requested permission to
12 do the autopsy.
13 A I believe I mentioned that in my deposition.
14 MR. WAGNER: I think that's all I
15 have. Thank you very much, Mr. Wiley.
16 THE WITNESS: Thank you.
17 THE COURT: Any other
18 cross-examination?
19 MR. OHLEMEYER: No, Your Honor.
20 THE COURT: Redirect, Mr. Howard?
21 REDIRECT EXAMINATION
22 BY MR. HOWARD:
23 Q Gary, do you know if your mother after
24 reading the American -- Marion Chronicle and
25 the Reader's Digest, and being a
 G. WILEY-REDIRECT

1599

1 professional nurse, if she obtained any
2 knowledge of the dangers of secondhand
3 smoke?
4 MR. WAGNER: Objection, Your Honor.
5 The question is prejudicially phrased.
6 There is no foundation laid that this
7 witness would have any knowledge as to
8 everything his mother read.
9 THE COURT: Sustained.
10 Q Do you have any -- were you ever told by
11 your mother or have any information as to
12 what your mother knew about the dangers of
13 secondhand smoke?
14 MR. WAGNER: Your Honor, I'm going
15 to object again to the prejudicial nature of
16 Mr. Howard's questions which are framed in
17 the sense of dangerous and all that.
18 THE COURT: Sustained.
19 Q Do you know if your mother knew anything
20 about the dangers of secondhand smoke?
21 THE COURT: Sustained.
22 MR. WAGNER: Could we have an
23 admonishment, please.
24 THE COURT: Why don't we move on,
25 Mr. Howard.
 G. WILEY-REDIRECT

1600

1 Q Gary, what's the level of your education?
2 A I have a Master's of Divinity.
3 THE COURT: I didn't hear you.
4 THE WITNESS: A Master's of
5 Divinity.
6 Q And what's your wife's occupation?
7 A She is a registered nurse, Bachelor's of
8 Science.
9 Q Before June of 1991, did you have any
10 information as to the dangers of secondhand
11 smoke?
12 MR. WAGNER: Well, Your Honor,
13 first of all, it's irrelevant.
14 THE COURT: Sustained. Whether he

15 had any information, that objection is
16 sustained. Let's move on.
17 Q Do you know if your mother had any?
18 MR. WAGNER: Objection. Same
19 question asked before.
20 MR. HOWARD: By the question
21 Mr. Wagner asked, she was an intelligent,
22 professional person who had information from
23 which she could make a choice as to whether
24 or not to work around that. I believe that
25 we should be able to explore into that as to
G. WILEY-REDIRECT

1601

1 what people knew and didn't know up to that
2 point in time, especially since this
3 witness' wife is a nurse and he is an
4 educated person.
5 THE COURT: Sustained.
6 Q Gary, on the autopsy, you did not -- do you
7 recall Dr. Turner asking can I perform an
8 autopsy?
9 A I don't remember those words, no.
10 Q Do you ever remember who asked for an
11 autopsy?
12 A No, I do not.
13 Q The Reader's Digest, do you know what years
14 you took the Reader's Digest, Gary?
15 A Yes. That would have been 1970.
16 MR. HOWARD: Thank you.
17 THE COURT: Recross, Mr. Wagner?
18 MR. WAGNER: No recross, Your
19 Honor.
20 THE COURT: Thank you, Mr. Wiley.
21 Call your next.
22 MR. MOTLEY: Judge, can we approach
23 briefly?
24 THE COURT: Sure.
25 (Bench discussion.)
G. WILEY-REDIRECT

1602

1 THE COURT: Call your next.
2 MR. CROSS: Your Honor, at this
3 time the plaintiffs would call Carla
4 Addington.
5 THE COURT: Raise your right hand.
6 PLAINTIFFS' WITNESS, CARLA ADDINGTON, SWORN
7 THE COURT: Have a seat right over
8 there, please. Would you tell us your name.
9 THE WITNESS: My name is Carla
10 Addington.
11 THE COURT: Would you spell your
12 last name, please.
13 THE WITNESS: A-D-D-I-N-G-T-O-N.
14 THE COURT: Thank you.
15 Mr. Cross.
16 DIRECT EXAMINATION
17 BY MR. CROSS:
18 Q It is Mrs., is it not?
19 A Yes.
20 Q Where do you live, Mrs. Addington?
21 A I live in [DELETED]
22 Q And although it's probably pretty apparent
23 to these folks and everyone else in the

24 courtroom, would you state for the record
25 what your relationship is to the people

ADDINGTON-DIRECT

1603

1 involved in this lawsuit.

2 A I am Mildred Wiley's daughter.

3 Q And you were in the courtroom when your
4 brother, Gary, just completed his testimony,
5 were you not?

6 A Yes, I was.

7 THE COURT: Ma'am, unlike most of
8 the lawyers, you speak very softly. I want
9 you to speak up just a little bit because
10 they're trying to hear you back here in the
11 back row.

12 THE WITNESS: Can I pull this down?

13 THE COURT: Yes. Sure, that's
14 fine. Thank you.

15 Q Do you mind if I call you Carla?

16 A That's fine.

17 Q Carla, what's your husband's name? You are
18 married?

19 A Yes, I am. My husband's name is Dwight.

20 Q And does he live with you there in

21 [DELETED]?

22 A Yes, he does.

23 Q What is his occupation?

24 A He's a minister.

25 Q And do you have any other members of your

ADDINGTON-DIRECT

1604

1 family that live with the two of you?

2 A We have two sons.

3 Q Could you tell the jury what their names and
4 ages are, please.

5 A Jonah is 13 and Wesley is 11.

6 Q How long has your husband been a minister?

7 A Since 1976.

8 Q And can you tell us when you and Dwight got
9 married?

10 A We were married in 1978.

11 Q Now, I will not go over all of the details
12 of the family life that your brother
13 described for us, but I think it is
14 important in order that the jury get some
15 knowledge as to what your mother was like
16 for the purposes of this case that they hear
17 from you some of those particulars, so I
18 would like to go over some of that ground.

19 There has been testimony that you and
20 the rest of your family lived in the country
21 of Suriname from 1963 to 1968. Can you tell
22 the jury what your earliest memories are as
23 a child?

24 A Of that experience, you mean?

25 Q Do you have any memory of life before you

ADDINGTON-DIRECT

1605

1 went to Suriname?

2 A Very little. Most of my childhood memories
3 would be my time in Suriname.

4 Q And how old approximately were you when you
5 and your folks moved to Suriname?

6 A I was almost five and I was almost ten when
7 we came back to the United States.
8 Q Now, your brother mentioned the subject of
9 where you lived and the kind of place it
10 was. Was it remote?
11 A Yes.
12 Q How far away was any other human beings?
13 A Well, we weren't that far from other people.
14 There were villages within walking distance
15 around our compound.
16 Q What language is spoken in Suriname?
17 A The official language is Dutch. We spoke a
18 dialect.
19 Q And was that because -- was that dialect
20 common to the native population that lived
21 there?
22 A Yes, it was.
23 Q Now, did you learn the Dutch language?
24 A I learned a few things in Dutch, but I
25 learned taki taki fluently.

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1 Q What is that?
2 A Taki taki.
3 Q And what is -- can you help me out there,
4 was that the language?
5 A It was the dialect the people spoke.
6 Q And was that the language that was spoken in
7 your home?
8 A Well, my brother and I talked that in our
9 home, but we had a rule at the dinner table
10 we had to talk English so we wouldn't forget
11 English.
12 Q Who imposed that rule?
13 A My mother.
14 Q Can you still speak taki taki today?
15 A I can speak some words. I can understand
16 more than I -- I can talk it. I can
17 understand it better.
18 Q Can you give us a few so we know what it was
19 like?
20 A "Fi joe tan? Mi de boen."
21 Q What does that mean?
22 A "How are you? I am fine."
23 Q Your brother said that you were home
24 schooled during the first few years of your
25 life in Suriname. Did you participate in

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1 that home schooling?
2 A Yes, I did.
3 Q Let me back up just a minute. Were there
4 any other Americans in the area where you
5 lived?
6 A Just my aunt and cousin, two cousins for
7 about two or three years that we were there.
8 Q And other than that, other than a few
9 members of your extended family, was anyone
10 else in the vicinity of where you lived
11 American or English speaking?
12 A No.
13 Q How many people -- did you live in a
14 village? Were you part of a community

15 there?
16 A We lived on a compound. It was a small
17 community.
18 Q How many people approximately, if you can
19 remember, lived in this compound?
20 A Maybe 15 to 20. I'm not real sure.
21 Q And were these people generally the subject
22 of or the intended subject of your father's
23 missionary work?
24 A Yes.
25 Q In other words, I'm trying to get an idea as
 ADDINGTON-DIRECT

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1 to how that missionary work was based. Was
2 he assigned to this community to minister to
3 these people, or did he have a larger range
4 of area?
5 A A larger range.
6 Q This was the people that lived right there
7 with you?
8 A And taught at the school.
9 Q Back to the schooling. Did you receive
10 schooling by your mother from the outset?
11 A Yes, I did.
12 Q And did she teach you and your brother at
13 the same time, or did she give each of you
14 individual attention?
15 A Well, we got individual attention, but we
16 sat at the same table. She would take turns
17 with us.
18 Q And can you tell these people over here what
19 kind of subjects that you were taught by
20 your mother at that age?
21 A The typical English, math. We wrote, I
22 remember, third grade writing a lot of
23 compositions, mythology, history. The same
24 things that all third and second -- third
25 graders learn.

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1 Q Did your mother have any training as a
2 teacher?
3 A No, she didn't.
4 Q You mentioned third grade. Did you actually
5 have grades?
6 A Yes. We were in Calvert Correspondence
7 Course, so it was an American correspondence
8 course.
9 Q How much time each day did your mother spend
10 with you on this home schooling?
11 A We usually only had school until noon
12 because it was very hot. And after lunch
13 time it was usually too hot to keep our
14 attention, so school was out for the day.
15 Q How did you like living in Suriname as a
16 child?
17 A I loved it. It was probably the best
18 memories of my childhood, was my time in
19 Suriname.
20 Q Did living on a compound with 15
21 non-speaking Americans -- non-American -- --
22 non-English-speaking people in the middle of
23 the jungle have any deteriorating effect on

24 your development?
 25 A I don't believe so.
 ADDINGTON-DIRECT

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1 Q Do you have an opinion as to why that is?
 2 A Well, I believe that children who are raised
 3 or who have different experience with
 4 different cultures probably are more
 5 broad-minded than someone who is raised in
 6 the same place all their life. That's just
 7 a personal opinion.
 8 Q Did you have any television there?
 9 A No.
 10 Q When you returned to the United States in
 11 1968, you would have been how old?
 12 A I was almost ten.
 13 Q And how did you as a ten-year-old who spoke
 14 taki taki fluently react to the idea of
 15 returning to your homeland?
 16 A I wasn't very excited about it because my
 17 memories were very limited, and Suriname was
 18 my home and the jungle was my home, and I
 19 wanted to stay.
 20 Q Would you tell the jury about an episode
 21 that took place at the airport when you were
 22 returning.
 23 A We landed in Indianapolis, and as we were
 24 coming down the ramp out of the plane I
 25 could see in the distance all of our
 ADDINGTON-DIRECT

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1 relatives so excited to see us and my
 2 parents were very excited to see their
 3 relatives, too, but me, being very shy and
 4 not wanting to deal with all this new stuff,
 5 I turned around and went back to the plane.
 6 Q How was your English when you returned to
 7 the United States?
 8 A My English was fine.
 9 Q And was that because your mother enforced
 10 that at the dinner table?
 11 A That was a help.
 12 Q Did you have the opportunity to speak
 13 English very often other than that?
 14 A Well, I did speak English to my parents
 15 unless they asked me not to, to help them
 16 learn the language.
 17 MR. CROSS: Could I have that
 18 picture, please.
 19 Q Carla, there's a photograph that's been put
 20 on the screen. This is an exhibit which has
 21 been put into evidence.
 22 MR. CROSS: What's the number? I
 23 just want to make, for the record, I want to
 24 indicate on the record what exhibit is being
 25 displayed. This is Exhibit 4 previously
 ADDINGTON-DIRECT

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1 admitted into evidence.
 2 Q Do you recognize that photograph, Carla?
 3 A Yes, I do.
 4 Q Who are all those people?
 5 A It's me and my mother and these were girls.

6 Q Which is which? Sorry. Go ahead. I
7 couldn't resist.
8 A These were girls that lived in the girls --
9 I think they're the girls that lived in the
10 girls' dorm that went to school -- they were
11 a part who went to our school.
12 Q You had a dormitory on this compound?
13 A Yes.
14 Q And were these playmates of yours, any of
15 them?
16 A Probably the ones standing beside me were my
17 playmates.
18 Q Do you remember their names after all these
19 years?
20 A The one by my mother was Laonie, but that's
21 the only one I remember on the front row.
22 Q And approximately how old are you in this
23 picture?
24 A I was probably eight, maybe seven. I'm not
25 sure.

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1 Q And this is a picture -- do you have any
2 memory of why this picture was taken? What
3 was going on that someone decided to have a
4 photograph made?
5 A It was Sunday, but I don't remember why this
6 group was taken, no, I don't.
7 Q How do you know it was a Sunday?
8 A Because it looks like the girl in the back
9 has a song book in her hand.
10 Q The one on the left?
11 A Yes.
12 Q Okay. And do you recognize any of the
13 buildings or the surroundings that are shown
14 in the background of this photograph?
15 A I do, but I can't tell you exactly. It's
16 not a real clear picture. I can't tell
17 exactly where it was. I know that's our
18 compound but I --
19 Q Do you have any idea whether or not that's a
20 house or residence, school?
21 A It might have been the school, but it's not
22 a house.
23 Q Okay. Thank you. Now, when you came back
24 to the United States, where did you go to
25 school then?

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1 A In Frankfort. I went to Riley School.
2 Q Just to briefly set the stage for these next
3 few questions, very quickly would you tell
4 the jury where you moved to and the progress
5 of your residence up until the time that you
6 moved to the Jonesboro area.
7 A When I came back from Suriname we lived in
8 Frankfort for a year approximately. We
9 moved to Marion. I went to Roseburg
10 Elementary School. Then we moved to South
11 Marion and I went to J.C. Knight Junior High
12 in Jonesboro.
13 Q And then did you go to high school in that
14 area?

15 A I went to high school at Mississinewa High
16 School, Gas City.
17 Q That's in Gas City?
18 A Yes.
19 Q When you came back to the United States and
20 you first went to Frankfort, what grade did
21 you go into?
22 A I was in fifth grade.
23 Q And were you held back or started a lower
24 grade because of the fact that you had had
25 home schooling?

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1 A No, I wasn't.
2 Q Were you in school in attendance with
3 children your own age from that point
4 forward?
5 A Yes.
6 Q When did you graduate from Mississinewa High
7 School?
8 A I graduated in 1976.
9 Q And would you tell the Court what position
10 in your class you were ranked when you
11 graduated?
12 A I was -- I graduated fifth in my class.
13 Q Out of how many?
14 A I think it's 196.
15 Q Did you ever at any time feel that you had
16 any disadvantage by reason of the fact that
17 you spent the first four or five years of
18 your education being taught at the kitchen
19 table instead of in a school?
20 A No, I didn't.
21 Q Now, as you got older, could you describe
ee years before
17 you and your husband moved to Pennsylvania?
18 A That's correct.
19 Q How close were you with your mother during
20 those particular years?
21 A We -- she wrote every week. I wrote every
22 week. We called every Saturday.
23 Q Do you believe that the distance that was
24 between you after you and your family moved
25 to Pennsylvania in any way diminished the

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1 closeness of your relationship with your
2 mother?
3 A I don't think so. I think it made our times
4 together more special.
5 Q You obviously know that this case is about
6 your mother's final illness. How aware were
7 you growing up and into your adult years of
8 your mother's health generally?
9 A She was as healthy as a horse. She never
10 missed work, rarely, for illness. She was
11 never in the hospital. She was -- she was
12 just one of the healthiest persons I knew.
13 Q What kind of things did she do to take care
14 of herself?
15 A Well, our diet was important. I was an
16 overweight child, and struggled with weight
17 most of my growing up years, so she was

18 always very careful what I ate, what we ate
19 as a family. And I always thought that's
20 how everybody else ate until I went to other
21 people's houses and then I realized not
22 everyone has the four food groups as a
23 regular part of their diet. And that's all
24 I knew.

25 Q Did she exercise?

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1 A She walked. She learned to ride a bike.
2 After I left home she and dad would ride
3 bikes.

4 Q And was this a regular practice in her later
5 years of her life, to exercise?

6 A I'm not aware of how much she did. I just
7 know she talked about that.

8 Q Are you aware of any ongoing medical
9 problems that your mother had from the time
10 of your childhood up until the time she
11 died?

12 MR. WAGNER: Excuse me. As long as
13 this is based on her observations, Your
14 Honor, and not a medical diagnosis.

15 MR. CROSS: Certainly.

16 Q You are not a medical doctor, are you,
17 Carla?

18 A No, I'm not.

19 Q You don't have any training like a nurse as
20 your mother did?

21 A No, I do not.

22 Q You've never worked in a hospital, clinic or
23 anything else?

24 A No, I haven't.

25 Q But you are aware, are you not, of general

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1 medical conditions that people have from
2 your own experience; correct?

3 A Yes.

4 Q Now, to repeat the question, are you aware
5 of any ongoing or recurring medical problem
6 that your mother had from the time that you
7 were a child until the time that she died
8 other than the cancer which took her life?

9 A No.

10 Q Do you have a personal understanding as to
11 how your mother was affected by the smoke
12 that existed in her workplace?

13 MR. WAGNER: Well, Your Honor, this
14 would call for speculation on the part of
15 the witness. We object.

16 MR. CROSS: May I respond to that,
17 Your Honor?

18 THE COURT: Why don't you rephrase
19 the question.

20 Q Do you have any personal knowledge, Carla,
21 as to how your mother felt about the
22 existence of cigarette smoke in her place of
23 employment?

24 MR. WAGNER: Speculation, Your
25 Honor.

ADDINGTON-DIRECT

1 A Yes.
2 MR. CROSS: It is not speculation.
3 THE COURT: You can answer that yes
4 or no.
5 A I said yes.
6 Q And what is the basis for your opinion?
7 Without telling us what your opinion is,
8 what is the basis on which you have that
9 personal knowledge?
10 A Reactions.
11 Q What do you mean?
12 A Her reactions to our complaining.
13 Q What complaining are you talking about?
14 A Her always smelling like smoke when she came
15 home, her hair always smelling like smoke.
16 Q And you complained. Who complained about
17 that?
18 A All of us did from one time or another.
19 Q All of us being?
20 A Being our family.
21 Q And her reactions. How did she react to
22 your complaints?
23 A I don't know specific words, but I could
24 tell that she didn't like it any more than
25 we did.

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1 Q Do you have an understanding as to why your
2 mother never left the VA for another job?
3 MR. WAGNER: Well, Your Honor, this
4 would call for pure speculation on the part
5 of this witness.
6 THE COURT: Sustained.
7 Q Was the subject of -- after you and other
8 members of your family would voice these
9 complaints about her smelling like smoke
10 when she came home, would there be family
11 discussions concerning the possibility of
12 her leaving to go and find other employment?
13 MR. WAGNER: Your Honor, this would
14 call --
15 MR. CROSS: That's a legitimate
16 question.
17 MR. WAGNER: It's would call for
18 hearsay. She's going to recite
19 conversations by other people at times
20 outside the courtroom and that is all
21 hearsay.
22 THE COURT: It's not offered for
23 what was actually said. You can answer that
24 last question yes or no.
25 THE WITNESS: Could I have the

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1 question?
2 THE COURT: The question was, Did
3 you have family discussions about other
4 employment.
5 A No.
6 THE COURT: All right.
7 Q Did your mother and father ever have any
8 discussions about that, to your knowledge?

9 MR. WAGNER: Again, Your Honor --
10 MR. CROSS: That's a yes or no
11 question and a fair one.
12 MR. WAGNER: As long as she answers
13 it yes or no, I have no problem.
14 Q Did your mother and father ever have any
15 discussions in your presence about Mildred
16 Wiley changing her place of employment?
17 A No.
18 Q Do you have any personal knowledge as to
19 whether your mother ever attempted to do
20 anything to try and change the smoking
21 policy at the VA Hospital?
22 A I believe she did.
23 Q And why do you --
24 THE COURT: I want you to speak up.
25 A I believe she did.

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1 Q Why do you believe that?
2 A Because she was frustrated.
3 MR. WAGNER: Excuse me, Your Honor.
4 Again this is all speculation. There is no
5 personal knowledge foundation here for this
6 testimony.
7 THE COURT: The last objection, the
8 last question as to why she believes, is an
9 improper question and the jury will
10 disregard her remarks.
11 Go ahead, Mr. Cross. You asked her
12 whether or not she knew her mother tried to
13 do anything at the hospital to change the
14 policy. She answered yes. Now we're ready
15 for your next question.
16 Q On what basis do you have the opinion that
17 your mother did something to try to change
18 the smoking policy at the hospital?
19 MR. WAGNER: Well, again, Your
20 Honor, she's going to recite. This is all
21 speculation.
22 THE COURT: That calls for hearsay
23 and speculation. If you observed anything
24 at the hospital between the hospital and
25 your mother, you can tell us.

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1 A No.
2 Q How did she get along with the people she
3 worked with at the hospital?
4 A She got along great.
5 Q Did she have -- were they social friends as
6 well as acquaintances from work?
7 A No. She left her work at home. I mean at
8 work. She didn't bring her work home.
9 Q Did she ever express to you the feeling that
10 this was something, the work that she was
11 doing for those veterans in that hospital
12 was important?
13 A Definitely.
14 MR. WAGNER: Excuse me, Your Honor.
15 These questions all call for hearsay, and I
16 hate to keep interrupting with objections
17 but they're all hearsay.

18 MR. CROSS: Your Honor, they are
19 exceptions to the hearsay rule under 803-1
20 and 3. They are present impressions
21 describing or making material events,
22 conditions or transactions while they were
23 being perceived. They are also existing
24 mental emotional -- statements of existing
25 mental emotional conditions as they were

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1 being generated at the time. This is this
2 own woman's mother. She certainly would
3 have the reasons to know those things.

4 MR. WAGNER: There's no foundation
5 laid.

6 MR. CROSS: They are hearsay but
7 they are excepted from the hearsay rule.

8 THE COURT: I don't think they are,
9 Counselor. The objection is sustained.

10 Q Could you tell us what you know about --
11 what you observed, if you will, about your
12 parents''s relationship, how they got along
13 with one another.

14 A They had a very strong marriage.

15 Q When did you come to learn that your mother
16 had contracted lung cancer?

17 A The day I arrived at Ball Memorial Hospital.

18 Q What was the purpose of your coming to the
19 hospital on that particular day?

20 A I was coming to be here for her back
21 surgery.

22 Q And this would have been when?

23 A I believe I left home maybe the last day of
24 May 1991.

25 Q And you knew she was going to have a back

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1 surgery?

2 A I knew that the surgery had been canceled
3 and something was terribly wrong.

4 Q So you weren't planning to come if the back
5 surgery was going to take place?

6 A I was coming originally for back surgery,
7 but then my dad called and said it was off
8 but to come anyway.

9 Q And so approximately when was it that you
10 got -- that you arrived?

11 A I believe it was either the last day of May
12 or the next to last day of May 1991.

13 Q And your mother died on June 24?

14 A Yes.

15 Q And you were living in Pennsylvania at that
16 time?

17 A Yes.

18 Q Your mother was hospitalized where?

19 A At Ball Memorial.

20 Q Here in Muncie?

21 A Yes.

22 Q Had you ever been in Ball Memorial Hospital
23 before that day?

24 A I don't believe so.

25 Q And most of us, a lot of us in this room are

ADDINGTON-DIRECT

1 from Muncie. Can you tell us where, what
2 part of the hospital your mother was
3 hospitalized in?
4 A I know it wasn't on the oncology floor
5 because that's one place she did not want to
6 be. I believe it must have been on the bone
7 ward because she went in under back surgery,
8 whatever that's called.
9 Q Now, what were the conditions that you saw
10 personally in that hospital when you arrived
11 that day near the end of May 1991?
12 MR. WAGNER: Well, Your Honor, I'm
13 going to object to this as the question is
14 vague and I'm not sure where this is going,
15 but the conditions at the Ball Memorial
16 Hospital when she arrived that day --
17 THE COURT: I don't understand the
18 question. Make your question more specific.
19 Are you talking about the conditions of the
20 hospital or the conditions of her mother?
21 MR. CROSS: I'll try to rephrase.
22 THE COURT: All right.
23 Q Carla, can you tell us, as you were walking
24 through the hospital, you had to -- you
25 observed you had to go by some various
ADDINGTON-DIRECT

1 places where people were working?
2 A Yes.
3 Q You had to go by various patients' rooms;
4 correct?
5 A Yes.
6 Q Did you see any break rooms where employees
7 would be sitting while they were taking a
8 break?
9 MR. OHLEMEYER: Your Honor, at this
10 point I think it's clear where it's going
11 and it's irrelevant and for that reason I'd
12 object to it.
13 MR. CROSS: May I address that?
14 THE COURT: I'm going to sustain
15 that objection, Counselor. Let's move on
16 with her testimony.
17 Q Did you observe people smoking at Ball
18 Memorial Hospital?
19 MR. OHLEMEYER: Same objection.
20 MR. WAGNER: It's the same
21 objection.
22 THE COURT: I sustained the
23 objection and directed you to move on to
24 another area.
25 Q Describe what you observed in terms of the
ADDINGTON-DIRECT

1 deterioration of your mother's condition
2 from the time you arrived at the hospital.
3 A She was in a lot of pain.
4 Q And did she remain in the same hospital room
5 the entire time you were there?
6 A No.
7 Q Where did they move her?
8 A Down the hall.

9 Q Same floor?
10 A Yes.
11 Q And did you have an occasion to meet her
12 treating physicians?
13 A Yes, I did.
14 Q Who were they?
15 A Dr. Scott Walker, Dr. Nicki Turner.
16 Q And were you satisfied with the care that
17 those physicians rendered your mother?
18 MR. WAGNER: Objection, Your Honor.
19 That's not relevant.
20 MR. CROSS: I'll let the question
21 stand. It speaks for itself.
22 THE COURT: You can answer that,
23 ma'am.
24 A Yes, I was.
25 Q Were you present when the diagnoses were
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1 made of your mother's condition?
2 A To whom?
3 Q To anyone. Let me just go into that. Where
4 were you and when were you when you first
5 learned of what your mother's situation was?
6 A I was in the hallway and Dr. Scott Walker
7 told my dad and I she had cancer.
8 Q Do you remember a conversation between
9 Dr. Turner and your father?
10 A I'm sure I heard --
11 MR. WAGNER: Excuse me. That's a
12 yes or no.
13 THE COURT: You can answer that yes
14 or no.
15 A Yes.
16 Q And what was the subject matter of that
17 conversation?
18 MR. CROSS: May I speak to the
19 objection before you rule, Your Honor?
20 MR. WAGNER: Objection, Your Honor,
21 it's hearsay.
22 MR. CROSS: Your Honor, this
23 conversation is not hearsay because it is
24 not being presented for the truth of the
25 matter asserted and I think once she

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1 describes the conversation, you will see
2 that we certainly don't --
3 THE COURT: Tell us generally what
4 they were talking about. I don't want to
5 hear about what they said, just generally
6 what they were talking about.
7 MR. WAGNER: Judge, with all due
8 respect, maybe I have to object to the
9 Judge's question. If she describes that,
10 then the jury is going to hear it so my
11 hearsay objection is sort of moot.
12 THE COURT: I asked her to tell us
13 were they talking about your mother's
14 condition.
15 THE WITNESS: I'm not sure when
16 he's referring to.
17 THE COURT: I'm not either. That's

18 a good question.
19 When are you referring to, Counselor?
20 MR. CROSS: She was present in the
21 conversation when Dr. Turner made an
22 accusation and I want her to describe that
23 accusation and it is not hearsay.
24 MR. OHLEMEYER: At that point, Your
25 Honor, it is hearsay and I object to it.
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1 THE COURT: Objection sustained.
2 Q Well, moving on then, Carla, can you tell
3 the jury during the time that you were in
4 Muncie, after you arrived at the end of May
5 1991 until the time that your mother died on
6 June 24th, did you have an opportunity to
7 observe your father and how he was
8 conducting himself during that time period?
9 A He seemed like a normal husband.
10 Q And what do you mean by that?
11 A Concerned.
12 Q Were you staying with him at his home?
13 A Yes. Yes, I was.
14 Q Were you guys going back and forth to Marion
15 every night?
16 A Yes, sir, we were.
17 Q Now, one of the elements of a wrongful death
18 action in this case, one of the elements of
19 damages has to do with the loss of care,
20 love and affection that the dependent next
21 of kin, in this case the surviving husband,
22 may sustain. What can you tell the jury
23 about the loss of care, love and affection
24 your father sustained by reason of your
25 mother's death?

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1 MR. WAGNER: I'll object to the
2 form of the question, Your Honor. Long
3 speech about what the law is.
4 MR. CROSS: I'll withdraw the long
5 speech.
6 THE COURT: It would probably be
7 better if I instruct the jury, Counselor, so
8 why don't you rephrase.
9 Q What can you tell the jury about the loss of
10 care, love, and affection sustained by your
11 mother -- sustained by your father by reason
12 of your mother's death?
13 MR. WAGNER: I hate to object, but
14 this is all speculation. She's being asked
15 to speculate about her father's feelings and
16 all that. She can testified to what she
17 observed.
18 THE COURT: Just tell us what you
19 observed, the effect.
20 A Well, I think Dad was, as any man who
21 depends on his wife for just the old
22 laundry, just companionship, she was his
23 best friend. Dad does not have a lot of
24 friends and --
25 MR. CROSS: Pass the witness.

ADDINGTON-DIRECT

1 THE COURT: Mr. Wagner, do you have
2 any questions?

3 MR. WAGNER: Yes. Again I'm going
4 to be very brief, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. WAGNER:

7 Q Mrs. Addington, good afternoon. You were
8 here in the courtroom when your brother was
9 being examined?

10 A Yes.

11 Q So you know who I am. I just have a very
12 few questions, I think.

13 One of the things I believe that you
14 testified about in answer to Mr. Cross'
15 questions were the reasons why your mother
16 went to work for the Veteran's
17 Administration. Do you remember that?

18 A Yes.

19 Q And I think one of the things that you said
20 was that it would allow her to have spent
21 more time with her children, one of whom was
22 you, of course.

23 A Well, what I meant was that she would be --
24 she would be there in the evenings. Family
25 time was very important, and to work

ADDINGTON-CROSS

1 constantly --

2 Q That's the question I wanted to ask you.
3 Your mother actually worked evenings and
4 nights at the Veteran's Administration
5 Hospital, did she?

6 A Not all the time.

7 Q But during -- up until the years when she
8 became head nurse, she alternated days,
9 evenings and nights, didn't she?

10 A She did some alternating, yes.

11 Q Just kind of bear with me here a minute,
12 Mrs. Addington.

13 Just to clear it up, you moved from
14 your parents' home permanently in 1978 when
15 you were married?

16 A That's correct.

17 THE COURT: You're going to have to
18 speak up now.

19 A That's correct.

20 Q Do you remember when you were deposed in
21 this case? That's when you were questioned
22 by lawyers --

23 A Yes.

24 Q -- and gave a deposition, somebody took down
25 the words, that's called a deposition. Do

ADDINGTON-CROSS

1 you recall that?

2 A Yes, I do.

3 Q I don't want to split any hairs, but in
4 answer to Mr. Cross' questions you said you
5 were at that hospital, the Veteran's
6 Administration Hospital where your mother
7 worked I think about 11 times, you thought.
8 Do you remember answers to his questions on

9 that subject?
10 MR. CROSS: I think the record will
11 show that the answer was less than ten.
12 A I said less than ten.
13 Q Oh, is that right? Then I stand corrected.
14 MR. WAGNER: Then I believe that's
15 all I have. Thank you very much,
16 Mrs. Addington.
17 THE COURT: Thank you very much.
18 Mr. Ohlemeyer, any questions?
19 MR. OHLEMEYER: No questions.
20 THE COURT: Thank you, ma'am. You
21 may step down.
22 I indicated, ladies and gentlemen, we
23 would finish at 3:00 or 3:30. We've done
24 that today. As I think I said earlier,
25 Monday is a holiday, President's Day. The

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1 courthouse is closed. We will not be in
2 session Monday. In order to accommodate one
3 of your members that has a matter to attend
4 to Tuesday morning, we will begin the
5 proceedings here and we will need you to
6 report at 11:00 a.m. on Tuesday. My thought
7 is we'll go until about 1:15, 11 to 1:15,
8 take a lunch break, come back at 2:15 and go
9 until 5:00 or 5:30 as we have been.
10 (Standard admonishment)
11 MR. CASSELL: All rise.
12 (Out of presence of jury)
13 THE COURT: We're still on the
14 record. Be seated, Counsel.
15 Plaintiffs filed a motion to exclude
16 prejudicial testimony regarding a witness,
17 Jeffrey Wigand.
18 MR. MOTLEY: Wigand, Your Honor.
19 THE COURT: Wigand, thank you. Am
20 I to consider this as a motion in limine,
21 Counsel? I've read it.
22 MR. MOTLEY: Yes, Your Honor.
23 MR. OHLEMEYER: What I'd like to
24 do, Your Honor, is take a look at it. I
25 just got it today.

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1 THE COURT: So did I.
2 MR. OHLEMEYER: Take a look at it
3 over the weekend and respond Tuesday
4 morning.
5 THE COURT: I was going to give you
6 a chance to respond to that.
7 Tell me, are you asking that the Court
8 to block any mention in cross-examination of
9 anything with the attachments here? Is that
10 the request?
11 MR. MOTLEY: Your Honor, the
12 defendants, Brown & Williamson, instigated
13 litigation against Dr. Wigand that was
14 settled in the so-called global negotiations
15 that led to the proposed congressional
16 resolution. Part of that was to drop that
17 lawsuit. That lawsuit was an effort to

18 demonstrate that Dr. Wigand -- the Kentucky
19 court allowed them wide berth in discovery
20 to go into multiple matters with respect to
21 his relationship with his children, with his
22 wife, whether he had been accused of
23 shoplifting and things of that sort, none of
24 which could form the basis for an
25 impeachment of a witness. And I don't think

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1 it's proper, certainly isn't, at least in
2 South Carolina, to ask a witness isn't it
3 true that you were accused of shoplifting.
4 I don't believe that that rises to the level
5 of, even if it were true, of a criminal
6 felony or anything that would result in an
7 imprisonment or anything like that.

8 I think we have annotated our papers,
9 Your Honor, with some of the information --
10 Can I look at something real quick,
11 Your Honor?

12 THE COURT: Memory serves, I had a
13 time limit on motions in limine, didn't I?

14 MR. MOTLEY: Your Honor, we didn't
15 think it would be appropriate because we
16 hadn't made a final decision whether we
17 would call Dr. Wigand or not. We decided to
18 call him. He's a witness and motions in
19 limine, I didn't realize we would have to
20 anticipate everything that might come up
21 with a witnesses. If we did, it's my fault,
22 I take blame for it.

23 In any event, Judge, I just wanted to
24 preinform you that these fellows spent 15
25 days deposing Dr. Wigand accusing him of all

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1 kinds of things, sic'd a publicist on him
2 who has since been summoned by a grand jury
3 for what he did. So this has a very
4 notorious and well-celebrated, if you can
5 use that word, in the media. Dr. Wigand was
6 a subject of a 60 Minutes presentation, and
7 he's obviously persona non grata to Brown &
8 Williamson.

9 I give these materials to Your Honor so
10 you'll see the type of attack they've made
11 on him and I just don't believe that's
12 relevant to the limited testimony that he
13 will be offering as a percipient witness who
14 is the former vice president of research and
15 development at Brown & Williamson.

16 I'm prepared to, since Mr. Ohlemeyer
17 has asked for time, which is a reasonable
18 request, obviously, to review these
19 materials. I'm obviously prepared to
20 address it whenever or shortly before
21 Dr. Wigand testifies.

22 THE COURT: When will he testify,
23 Counsel?

24 MR. MOTLEY: Well, Judge, I wanted
25 to bring this up, I'm glad you asked that

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1 question. We're kind of damming up here a
2 little bit. I don't mean damn in the
3 biblical sense, but D-A-M-M-I-N-G, up here,
4 and so we're having to shift and jive and
5 chuck, as they say back home. And I can't
6 honestly tell right now who is going to
7 testify on Tuesday except that I can say
8 that there will be several nurses and the
9 nurse's assistant Mr. Hughes. I believe --
10 we haven't decided exactly, Your Honor, but
11 there will be several nurses and nurses'
12 assistant.

13 We have -- we're backing up here on
14 these deposition matters. And I know Your
15 Honor has ruled that you don't want to just
16 let them -- you want to rule in advance.
17 There's a lot of objections. Virtually
18 every other question after the man's name is
19 asked that the defendants raise about the
20 depositions of their former employees.

21 And so we really wanted to, and I think
22 we have now filed with you, Judge, we filed
23 with Your Honor, you remember you asked us
24 about the Osdene matter?

25 THE COURT: I have that and I have
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1 reviewed that.

2 MR. MOTLEY: And we want to do that
3 deposition early next week.

4 We also have the matter that we wanted
5 to address today of Dr. Colby, the former
6 senior scientist for RJ Reynolds. And we
7 have the other matter of Dr. Gary Huber, who
8 is a former consultant to RJ Reynolds and
9 others, and to Mr. Ohlemeyer's law firm, who
10 we intend to show the deposition of from the
11 Texas trial.

12 So these are all deposition matters
13 that, depending on Your Honor's ruling, that
14 will dictate who the live witnesses are. I
15 don't want to have a deposition day and put
16 everybody to sleep where I keep pushing
17 these depositions back to the end of the
18 trial. As you know, the attention span of a
19 video deposition is not great.

20 MR. OHLEMEYER: May I make a
21 suggestion?

22 THE COURT: Surely.

23 MR. OHLEMEYER: I'd like to respond
24 first thing Tuesday morning to the --

25 THE COURT: Motion in limine?
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1 MR. OHLEMEYER: On Wigand, the
2 motion in limine.

3 THE COURT: That would be fine.

4 MR. OHLEMEYER: Both on procedure
5 and substance. Then I'd like to respond to
6 the Osdene motion that I was served with at
7 noon today on Tuesday morning.

8 THE COURT: That's fine.

9 MR. OHLEMEYER: And then I might
10 suggest that one thing we might think about
11 is for Mr. Motley -- as you know, they've
12 designated dozens of depositions, I don't
13 think they intend to use them all. Maybe if
14 they came in on Tuesday and told us here are
15 the depositions we really want to do, then
16 we could pick an evening, maybe Wednesday,
17 or even Tuesday evening, spend an hour or
18 two with the Court, sort through some of
19 those objections, they could edit the
20 videotapes, and move forward.

21 MR. MOTLEY: Judge, if you listen
22 to 30 seconds of both sides on every
23 objection they've got to these depositions
24 you'll be here from now to Christmas.

25 MR. OHLEMEYER: In all fairness,
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1 Mr. Motley, I think there are some broad
2 rulings that the parties would understand if
3 the Judge, if you say this is what I think
4 on this subject, there are a lot of
5 objections that we can deal with as mature
6 adults. If the Court says this is what I
7 think about these objections.

8 MR. MOTLEY: Are you bringing in
9 some new lawyers?

10 THE COURT: I think that's an
11 excellent idea, Counsel. And I would be
12 willing to do that an evening next week, but
13 I do need to know what the plan is here on
14 the deposition, so Tuesday morning,
15 plaintiffs be ready to tell me --

16 MR. MOTLEY: Yes, sir.

17 THE COURT: -- when they want to
18 offer these particular depositions.

19 MR. MOTLEY: I intend to offer
20 Osdene on Tuesday if Your Honor permits. I
21 intend to sandwich Osdene and Colby with
22 live witnesses. So my intention would be to
23 put up two or three live witnesses on
24 Tuesday between those depositions. If Your
25 Honor says you can't use it, I'll obviously

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1 have -- I'm not going to ask for any dead
2 time. I'll have sufficient live witnesses
3 listed that we can get them all here, local
4 witnesses, so we won't have any dead time on
5 Tuesday.

6 THE COURT: How many defense
7 counsel want to be heard on the Osdene
8 issue?

9 MR. OHLEMEYER: I do, Your Honor,
10 but it's a simple one because you're either
11 going to let it in or keep it out. We're
12 not going to have a lot of arguing about
13 questions and answers. There's a
14 deposition, there's counter-designations,
15 and you're either going to decide it comes
16 in or it stays out. So that one won't be a
17 hard one to deal with Tuesday, if we have

18 to.
19 THE COURT: All right.
20 MR. MOTLEY: Your Honor, did you
21 receive the orders from the Minnesota and
22 Texas cases with respect to Dr. Osdene in
23 that stack we gave you? If you didn't --
24 THE COURT: I did.
25 MR. MOTLEY: Your Honor, we must
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1 file the Texas order under seal.
2 THE COURT: I saw that.
3 MR. MOTLEY: It is under seal.
4 Now, I'm sure the defendants aren't
5 interested in distributing it, but I'd like
6 the record to reflect that that part of our
7 motion needs to be under seal.
8 THE COURT: All right. The record
9 will so reflect.
10 I've asked the jury to come in at
11 11:00. Why don't we reassemble at 10:00 and
12 we'll talk about the Osdene deposition.
13 MR. OHLEMEYER: Very good.
14 THE COURT: I'll let you know
15 Tuesday what evening would be -- what
16 evenings might be appropriate.
17 MR. MOTLEY: May I mention one
18 other thing, Judge, while we're talking
19 about that?
20 THE COURT: Sure.
21 MR. MOTLEY: Dr. Colby is a German
22 immigrant and he's very -- has a very thick
23 German accent, he's very difficult to
24 understand. What we have undertaken to do
25 is take the certified court reporter's
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1 transcript, and we're doing this for the
2 defendant's designations as well as ours,
3 and having, like if it was a foreign movie,
4 having the -- what do you call that --
5 closed caption of what he said. And we will
6 give this to the defendants so that there
7 won't be any claim that what he says is not
8 what the transcript reflects he said.
9 THE COURT: That's Dr. Colby?
10 MR. MOTLEY: Yes, Your Honor. I
11 would represent to you that, in certain
12 portions, he's very difficult to understand.
13 THE COURT: All right.
14 MR. WAGNER: May I ask when we will
15 get that?
16 THE COURT: That was what I told
17 him to --
18 MR. MOTLEY: We have already given
19 you the designations.
20 MR. WAGNER: Right.
21 MR. MOTLEY: Okay. And the
22 designations --
23 MR. WAGNER: I think there is --
24 MR. MOTLEY: You haven't gotten
25 Colby's designation? I can't believe -- I
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1 mean, I'm not questioning your integrity. I
2 can't believe my people haven't given you
3 that. I've been on them for a week.
4 They're defending themselves, Your
5 Honor, saying, that in fact they have. So I
6 don't know where the truth is. You'll get
7 it before I walk out of here if you don't
8 already have it.
9 THE COURT: Anything else?
10 MR. OHLEMEYER: Just a housekeeping
11 matter, Your Honor.
12 THE COURT: Go ahead.
13 MR. OHLEMEYER: Remember you
14 admitted other defendants' objections
15 Exhibit 1378 and Exhibit 16721 in
16 Dr. Roggli's redirect examination?
17 THE COURT: I recall that.
18 MR. OHLEMEYER: Help me with
19 whether there is a record of our objection
20 from side bar or whether -- should I make a
21 short record to make sure it's on the
22 record, because we come to side bar you
23 cover the microphones.
24 THE COURT: The only thing I did
25 was cover the amplification. I think you

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1 were picking up. She's picking up the side
2 bar conferences.
3 MR. OHLEMEYER: Very good. Just
4 wanted to make sure.
5 THE COURT: But I'll double check
6 that to make sure and if I am incorrect on
7 that issue, I will let you know.
8 MR. OHLEMEYER: Thank you.
9 THE COURT: Mr. Cross?
10 MR. CROSS: I have one issue,
11 Judge. As plaintiffs' case proceeds, there
12 are going to be a number of times when we
13 will probably want to make an offer to
14 prove. In the interest of convenience
15 rather than waste the Court's time with
16 that, if Counsel would agree that we
17 wouldn't waive the issue by deferring it
18 until the close of the evidence sometime
19 after that.
20 THE COURT: We've talked about
21 that, yes.
22 MR. CROSS: Thank you.
23 MR. OHLEMEYER: Yes. Thank you,
24 Judge.
25 THE COURT: Any other matters we

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1 need to attend to at this point? Have a
2 nice weekend.
3 (The proceedings were adjourned at 3:45
4 p.m. to be reconvened on February 17, 1998,
5 at 10:00 a.m.)
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